

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**BRIEF FOR APPELLANT AND
JOINT APPENDIX**

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10449 **143**

GARRETT BIBLICAL INSTITUTE, *Appellant*

v.

AMERICAN UNIVERSITY, *Appellee*

Appeal from the United States District Court for the
District of Columbia.

*United States Court of Appeals
for the District of Columbia
Circuit*

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,449

GARRETT BIBLICAL INSTITUTE, *Appellant*

v.

AMERICAN UNIVERSITY, *Appellee*

Appeal from the United States District Court for the
District of Columbia.

BRIEF FOR APPELLANT

This is an appeal from a final judgment of the United States District Court for the District of Columbia. Jurisdiction of this Court is invoked under Title 17, Section 101 of the District of Columbia Code, 1940 Edition.

STATEMENT OF CASE

On March 25, 1946, the appellee, American University, hereinafter called appellee, filed a Complaint for Declaratory Judgment in the Court below, naming this appellant as defendant, in which the controlling questions presented

are: (1)(a) Whether a certain sum, to wit \$16,000.00, donated by Mrs. Gustavus F. Swift to the appellee in 1913 and 1914 constitutes a trust fund to be administered as such by appellee; or (b) whether the donation was to the capital funds of the appellee to be used as it saw fit, and in its sole discretion; or (2) Whether, if the said sum was donated by Mrs. Swift as a gift, such restrictions were placed upon the gift, and accepted and recognized by the appellee, as to create an obligation on the donee to use the said sum for a certain purpose.

This case was here on appeal once before. The opinion is reported in 82 U.S. App. D.C. 263; 163 Fed. (2d) 265. This Court, speaking through Mr. Justice Clark, very clearly, correctly, and succinctly stated the essential facts, the issue, and the law. We take the liberty of quoting what he said:

“The case involves the administration of certain Funds of The American University used to finance the Gustavus F. Swift Fellowship. The annual incumbent of the fellowship is a graduate of the appellant institution, The Garrett Biblical Institute. The actual controversy before us arose when the Board of Trustees of the University, in 1942, adopted a resolution, the effect of which was to require that in the future the benefits of the Swift Fellowship must be applied to study at the American University, only, rather than be available for study elsewhere which had been the practice for over twenty-five years. Considerable opposition to this change was registered by appellant. After protracted correspondence and negotiation between the parties and their counsel, the appellee University filed a complaint asking the court to adjudge:

(1) That the University at all times has had and continues to have, within the limits of the special Acts of Congress under which it is incorporated, full right, power, and authority to administer its invested capital funds and the income therefrom, with full right, power, and authority to determine and effect, and from time to time to vary or change, in part or in whole, the application and disposition of all of its said funds, capi-

tal and income, as it, in its discretion, may see fit, subject only to any restrictions validly imposed by a donor, or bindingly undertaken by the University, or vested rights of others with respect thereto; (2) that that portion of its funds immediately involved and used to finance the Swift Fellowship is a part of its said funds and is not and never has been subject to any restrictions or any vested rights of others than the University with respect to administration, application, or disposition thereof; and (3) that the action embodied in the resolution adopted by its Board of Trustees April 9, 1942, changing the terms of award of the Swift Fellowship was and continues to be in all respects valid and does not infringe upon any right of Garrett Biblical Institute.

"Appellant filed an answer and counterclaim seeking declaratory relief in its favor."

* * *

"Appellee alleged in its complaint that 'a large portion of Mrs. Swift's gifts to the University were made without restrictions as to their use, and the aforementioned gifts of \$5,000, \$6,000, and \$5,000 were so made, * * *.' Appellant's answer 'denies that there were no restrictions upon the said \$16,000.00 Fund but on the contrary states that the said fund was created for the specific purpose of financing the Swift Fellowship and for no other purpose.' This particular conflict of fact goes to the very heart of the controversy, for while the appellee University governed its course of action by the general proposition that it has, within the limits of its corporate purposes, full right, power and authority over its funds and by its belief that the funds here involved came within this proposition since they were donated to the University with no condition or no restriction attached by the donor, appellant proceeded on the theory that there were restrictions or conditions existing which must be complied with by the University in administering the fellowship fund. * * *

* * *

"Appellee's verified complaint, motion for summary judgment and affidavit filed in support of the motion do not disclose the source of its determination expressed

in the adopted resolution that 'the original gift was to enable a student nominated by the Faculty of the Garrett Biblical Institute, to study in the graduate division of the American University in Washington, D. C.' other than a reference that 'a careful search of documents relating to the terms of the award * * * together with the attending circumstances of the gift' made clear to it such a conclusion. Surely the documents referred to in and attached to the complaint as exhibits, constituting excerpts from the University's official quarterly publication and a letter from the donor of the gift addressed to the University and concerning only \$5000 of the gift, do not compel such a conclusion as a matter of law when balanced with twenty-five years of contrary conduct. And although appellant has made no offer to show the existence of evidence in support of its denial and defense, and there may be some doubt as to the existence of a defense, still much, if not all, of appellant's defense depends on a cross-examination of appellee's witnesses and an examination of appellee's documentary evidence, and we feel that since the defense is asserted in apparent good faith appellant is entitled to a trial which provides this opportunity to them. On the record as it stands, we cannot say that 'it is quite clear what the truth is.' "

Upon the issues and the law as thus stated by the Court the case was tried in the Court below. Oral testimony was taken and many documents and letters were introduced in evidence.

In his opening statement counsel for appellee stated (App. 44-45) to the Court:

"We propose to show to your Honor that there is no evidence whatsoever to show that the funds which were given and which the University devoted to this fellowship were subjected to restrictions or that they were given to the University in trust. All of the evidence which it has been possible to amass through searching the University's records, fails to show anything in that direction.

"On the contrary there are indications in the evidence which it has been possible to assemble that these gifts were given by Mrs. Swift to the University without restrictions upon them.

"We contend that this fund of \$16,000, made up of three gifts—one of \$5,000, one of \$6,000 and another of \$5,000—is no more than a part of the general invested capital endowment fund of the American University, and that there is in the absence of restrictions imposed by the donor, or the vesting of rights in others, the inherent right in an educational institution to manage and direct its funds as it sees fit.

"We shall show Your Honor that in announcing and offering this fellowship in the name of Mrs. Swift's deceased husband, the University at no time committed itself to any detail as to how that particular fellowship was to be administered. They did from the beginning state in their announcements that only graduates of Garrett Institute would be eligible, but they consistently reserved the right of passing upon the qualifications of the candidates and of passing upon the places and locations where they should study under that fellowship."

Counsel for Appellant in his opening statement (App. 45) said:

"This fellowship was specifically set up by Mrs. Swift as a memorial to her husband, with certain specific restrictions limiting it. Not, as Mr. Colladay says, as free gifts of (to) the American University. * * * In this case, as we will show, the American University in seeking to get people to put their money into these fellowships stated * * * that they (the recipients of the fellowship) could pursue their postgraduate studies at Institutions of learning or seats of learning either in this country or abroad.

"Now, from 1915 up to 1942 that course was followed * * *. All through those years (they) went to well known institutions in this country, the Union Theological Institute, Yale, Harvard, University of Chicago,

and in two cases to Berlin and Edinborough where the parties involved pursued their studies in theology.”
(Parenthesis supplied).

Thus, the trial court was confronted with the question of whether the evidence presented at the trial showed that the donations made by Mrs. Swift, which were used to establish the Swift Fellowship, created a trust fund, or a gift restricting their use, which legally compels the appellee to administer the trust, or restricted gifts, in accordance with the purpose and intent of the donor and donee at the time the donations were made and the fellowship established. If the donations and the establishment of the fellowship constitute a trust, or if the donations constitute a gift with restrictions as to its use, we submit that the appellee is bound to administer the funds in accordance with the trust, or the restrictions placed upon the gift. On the other hand, if there is no trust, and no binding restriction upon the gift, then the appellee is left free to use the said funds as it sees fit.

STATUTES INVOLVED.

Title 27, Section 101 of the District of Columbia Code, 1940 edition, Declaratory Judgment Act, 48 Stat. 955, 28 U.S.C.A. 400.

STATEMENT OF POINTS.

1. The sum of \$16,000 was donated by Mrs. Swift to the American University, appellee, to establish the Gustavus F. Swift Fellowship.
2. The conditions of the donation and the establishment of the Swift Fellowship create a trust which the appellee was and is bound to administer in accordance with its intent and purpose.
3. The evidence shows that the parties understood in 1913 and 1914 that the funds donated to appellee by Mrs. Swift were restricted as to their use, and that they were

to be used only for the establishment and administration of the Swift Fellowship in accordance with certain terms—one of which was that the recipient of the Fellowship is to be a graduate of Garrett Biblical Institute, appellant; and another was that the recipient of the Fellowship was accorded the right and privilege of pursuing “their studies at seats of learning or at places of study and investigation within the United States * * * or abroad.”

4. The resolution of the appellee’s Board of Trustees, dated April 9, 1942, in which the appellee interprets that the income from the funds establishing the Swift Fellowship shall only be made available for the support of a graduate fellowship for study in The American University is, in a most material respect, in violation of the conditions of the donation by Mrs. Swift and of the terms of the Swift Fellowship.

5. The terms of the Swift Fellowship, the circumstances of the solicitation of the funds by the appellee, and the conditions of the donation by Mrs. Swift, balanced with more than twenty-five years of course of conduct, impel the conclusion that the recipient of the Swift Fellowship award shall: (a) be a graduate of Garrett Biblical Institute, and (b) shall not, as a condition thereof, be compelled to attend American University.

SUMMARY OF ARGUMENT.

This is a complaint for Declaratory Judgment in which The American University requests the Court to adjudge that the funds here involved, and used to finance the Gustavus F. Swift Fellowship, are a part of the general invested capital funds of The American University; that the University has had at all times and continues to have full right, power, and authority to administer said funds and income therefrom, and to determine and effect, and from time to time to vary or change, in whole or in part, the application and disposition of the funds, capital and income,

as it, in its discretion, may see fit; that there are no restrictions imposed by the donor of these funds and none bindingly undertaken by the University; and, that the resolution adopted by the Board of Trustees of The American University dated April 9, 1942, restricting the recipient of award under the Swift Fellowship to study at The American University was and continues to be in all respects valid.

Appellant says that in the year 1913 appellee formulated a plan for its promotion and development. Included in the plan was establishing and financing Fellowships. In December 1913 the appellant officially announced that the cost of financing a Fellowship would be \$16,000. However, as the evidence discloses, the University had determined upon the amount required to finance a Fellowship at some time prior to its official announcement. In early October 1913 its solicitor of funds to finance Fellowships, Dr. Fred M. Stone, a graduate of Garrett Biblical Institute, called upon Mrs. Swift and persuaded her to donate \$16,000 to finance this Fellowship. On October 7, 1913, appellee's solicitor of funds advised the appellee that he had secured a total subscription of \$16,000 from Mrs. Swift "to be a perpetual foreign fellowship for Garrett Biblical Institute." This fellowship was to be known as the "George F. Swift Fellowship." Thereafter the name "George" was found to be in error and it was corrected to "Gustavus", so that the fellowship was named The Gustavus F. Swift Fellowship. Plaintiff's Exhibits 6, 7, 8 and 9. A perusal of these four exhibits, taken from the files of the American University, clearly shows that it was the then understanding of the donor and the donee that the donor was to pay \$16,000; the Fellowship was to be known as the "Gustavus F. Swift Fellowship"; the recipient of the fellowship was to be a graduate of Garrett Biblical Institute; and the recipient of the fellowship was granted the right and privilege of attending a higher seat of learning, either in the United States or abroad.

In the December 1914 issue of The American University Courier—Volume No. 23, the appellee made an official announcement of the fellowships, the types thereof, and further announced that Mrs. Swift had endowed the Gustavus F. Swift Fellowship. (Plaintiff's Exhibit 10.) This exhibit likewise shows on its face that the donee of the funds constituting the Swift Fellowship and the donor understood that the recipient of the Swift Fellowship was privileged to attend a seat of learning or place of study and investigation either within the United States or abroad.

In February 1915 appellee forwarded application blanks for the Swift Fellowship to appellant. (Plaintiff's Exhibit 11.) A copy of this application blank is in the record as defendant's Exhibit No. 4. These two exhibits show beyond question that the appellee understood and intended that the recipient of the Swift Fellowship was privileged to attend an institution or place of study at some place other than the American University, as the University had printed on defendant's Exhibit 4 the following to be answered by the recipient: "Institution or place of proposed study."

The first fellowship was granted to Merrill Jacob Holmes on his application dated May 12, 1915, and he attended Harvard University. Through all the years from 1915 to 1942 recipients of the Swift award attended seats of learning other than the American University. This 25 years course of conduct coupled with the clear intent of the parties at the time the funds to finance the Fellowship were solicited from Mrs. Swift; the terms and conditions of the Fellowship as established by the American University; and the announcement of the Fellowship by the American University show beyond peradventure of doubt that the recipient of this Fellowship was privileged and had the right to attend a seat of learning or place of study either within or without the United States, and was in no way bound by the terms of the Fellowship to attend the American University. It necessarily follows that the resolution of the American

University dated April 9, 1942, is in violation of the terms of the Fellowship. It should therefore be declared to be of no force and effect. The American University should either be directed to administer the funds and the Fellowship in accordance with its original terms and conditions, or it should be removed as trustee of the fund and fellowship, as requested by appellant in its Answer and Counterclaim, and another trustee substituted with directions and authority to carry out the terms of the trust.

ARGUMENT.

- 1. The sum of \$16,000 was donated by Mrs. Annie M. Swift, Chicago, Illinois, to the American University, appellee, to establish the "Gustavus F. Swift Fellowship".**

We have stated, in the Summary of Argument, the facts and circumstances relating to the financing of the Gustavus F. Swift Fellowship by Mrs. Swift, and we do not deem it necessary to re-assert them here. See Plaintiff's Exhibits 6, 7, 8, 9 and 10 and Defendant's Exhibit 4. We merely emphasize that, contrary to the allegations in the complaint, and contrary to the statement of appellee's counsel at the trial, these written and printed exhibits, dated at the time the Fellowship was financed and established, show that it was the intention of the parties that the recipient of the award under the Gustavus F. Swift Fellowship should attend a seat of learning or place of study either within or without the United States, and was in no manner restricted to attending the American University.

- 2. The conditions of the donation and the establishment of the Swift Fellowship create a trust which the appellee was and is bound to administer in accordance with its intent and purpose.**

The creation and establishment of this fund and Fellowship constitute a charitable trust to an educational institution and is enforceable as such. *Ould v. Washington Hospital*, 95 U. S. 303; *Noel v. Olds*, 138 Fed. (2d) 581.

This gift was solicited and made in the State of Illinois, the residence of Mrs. Swift. In that State the authorities hold that a gift to a charitable or educational institution for any of the purposes for which it is incorporated creates a trust. Other states holding the same view are Alabama, Arkansas, Colorado, Iowa, Kansas, New Hampshire, Oregon and Rhode Island. See Volume 24, Washington University Quarterly and 25 Virginia Law Review, Page 764.

The authorities in Maryland relating to charitable trusts are annotated in 130 A. L. R. 1102. In *Second National Bank v. Second National Bank*, 171 Maryland 547, 111 A. L. R. 711, it is found that the Maryland Legislature by act of 1931, Chapter 453, Section 268 (a), Article 16 of the Code, Supp. 1935, removed what had been an obstacle to holding charitable trusts valid and enforceable when the beneficiaries thereof constituted an indefinite class, or that trusts or limitations thereto were limited to extend for a perpetual or indefinite period. Thus it seems that in Maryland the rule now is that gifts of the nature here involved would be considered as creating charitable trusts.

In *Art Students' League of New York v. Hinkley*, 31 Fed. (2d) 469 many authorities are reviewed pertaining to the question and the Court states at Page 478:

"In another particular, of paramount importance, devises to corporations for charitable purposes in Maryland have some resemblance to charitable trusts; that is to say, in the matter of enforcement. For the general rule, see 5 R. C. L. 359. It is essential that this power exist somewhere, for otherwise it would be possible to frustrate the intention of the testator or donor; and there would be no need of further argument to justify a declaration against the validity of the gift. *Barnum v. Mayor, etc., of City of Baltimore*, 62 Md. 275, 298, 50 Am. Rep. 219. There seems to be no difficulty in this respect in Maryland. Nothing is found in the cases which have sustained the validity of such gifts to indicate that the donee's control is absolute and unfettered. On the contrary, in the only case in which

the question was directly raised, the power to enforce the conditions of the charitable use was upheld, and in a number of cases general statements to the same effect are found."

In disposing of the contention that the Art Students' League could not maintain travelling scholarships because its charter specified that its business shall be done in New York City, the Court said in the Hinkley case, *supra*, that:

"It is contended that a bestowal of funds to enable an art student to travel abroad is outside the powers of the school, because under its charter its place of business is New York City. There is no substance in this argument. It has been held that, if the location of a school is fixed by its charter, the location cannot be changed without amendment; but it does not follow that all the powers conferred upon the corporation must be exercised at the designated place, and no other. See 11 Corpus Juris, 982, 983. *It is also held that a corporation, under its general and implied power, may receive contributions to an endowment fund and bind the college to furnish tuition thereafter to one or more students, even in another educational institution than its own.* 11 Corpus Juris, 998; *Genesee College v. Dodge*, 26 N. Y. 213." (Emphasis supplied).

In the District of Columbia charitable trusts are highly favored. Gifts creating charitable trusts to educational institutions are recognized and enforceable as such. *International Reform Federation v. District Unemployment Compensation Board*, 76 U. S. App. D. C. 282, 131 Fed. (2d) 337; *Sedgwick v. National Savings and Trust Company*, 76 U. S. App. D. C. 177, 130 Fed. (2d) 440; *Beach v. Gilbert*, 77 U. S. App. D. C. 117, 133 Fed. (2d) 50.

In *Board of Directors of City Trusts of Philadelphia v. Maloney*, 78 U. S. App. D. C. 371, 141 Fed. (2d) 275, this court stated that charitable trusts are highly favored in the law, and that the construction of all instruments where charitable trusts are concerned is liberal in their behalf. See also *King v. Richardson*, 136 Fed. (2d) 849, certiorari

denied 64 S. Ct. 91, 320 U. S. 777, 88 L. Ed. 466. In 10 American Jurisprudence, "Charities," Section 64, Page 631, it is stated:

"The founding and support of private institutions of learning and the endowment of professorships and scholarships are also charities, as gifts for these purposes are designed to promote the public good by the encouragement of learning, science, and the useful arts."

14 C. J. S., "Charities," Section 15, Page 444, recognizes that gifts for the advancement of learning, science, and the useful arts generally are charitable, and enforceable as such.

It seems clear that Mrs. Swift's donation to the American University and the creation of the Fellowship resulted in a charitable trust and, as such, is enforceable in the District of Columbia, as well as Illinois. The beneficiaries of the trust are clearly ascertainable as being graduates of the Garrett Biblical Institute. *Ould v. Washington Hospital for Foundlings*, 95 U. S. 303 and 24 L. ed. 450; *Noel et al. v. Olds, et al.*, 138 Fed. (2d) 581.

3. The parties understood in 1913 and 1914 that the funds donated to the appellee by Mrs. Swift were restricted as to their use, and that they were to be used only for the establishment and administration of the Gustavus F. Swift Fellowship in accordance with certain terms: One was that the recipient of the Fellowship was to be a graduate of Garrett Biblical Institute, appellant; and the other was that the recipient of the Fellowship was accorded the right and privilege of pursuing his studies at seats of learning or at places of study and investigation within the United States * * * or abroad.

For the purposes of clarity and brevity we shall here consolidate our argument under Points 3, 4 and 5.

The appellee admits in its pleadings and at the trial of the case that under the terms of the Fellowship the re-

recipient thereof is to be a graduate of Garrett Biblical Institute. It, however, insists that the recipient of the Fellowship must, by virtue of its resolution of April 9, 1942, attend the American University. We contend, and the evidence so shows, that in 1913 and 1914 when the funds were solicited and the Fellowship established, the parties intended and so stated, that the recipient of the Fellowship might attend a place of study or seat of learning either within or without the United States. The donation financing the Fellowship was made by Mrs. Swift and the American University announced the Fellowship with that understanding. The Fellowship was awarded to graduates of Garrett Biblical Institute to attend seats of learning other than the American University from 1915 to 1942. At the time Mrs. Swift made the donation she was residing in Chicago, Illinois, within a few miles distance from the Garrett Biblical Institute. She died on or about May 19, 1922. Thus during seven years of her life the award of the Fellowship was made annually to a graduate of the appellant institute who attended places of study other than the American University. These facts and the course of action over the years establish beyond question the terms and conditions of the Fellowship and the intention of the parties. As was said by the Court in *Brooklyn Life Ins. Co. v. Dutcher*, 95 U. S. 269, 24 L. Ed. 410:

“There is no surer way to find out what parties meant than to see what they have done.”

And in *Attorney General ex rel Quin v. Drummond*, 1 Drury and War. 363, quoted in *Waters v. Kopp*, 34 App. D. C. 575, 580, the Court said:

“Tell me what you have done under a deed, and I will tell you what that deed means.”

The principle of law set forth in these two last cited cases is peculiarly applicable to the facts in this case.

The weight of authority is that transactions of the nature here involved create a charitable trust. A small minority hold that such transactions constitute gifts with restrictions placed upon them, which restrictions the Courts recognize and will enforce. The Appellee admits that the acceptance of the gift and the creation of the Fellowship is within its corporate purpose. It follows that the rule applies that a gift or bequest made to a corporation, designating its use within the corporate purpose, must be used for that purpose and no other. *St. Joseph Hospital v. Bennett*, 281 New York 115; 130 A. L. R. 1092. The Court in discussing the rule stated:

"No authority has been brought to our attention that a gift to a charitable corporation with the express direction that it be applied to a specific corporate purpose in a specific manner may be accepted by the corporation, and then used for a different corporate purpose in a different manner. No trust arises, it is true, in a technical sense, from such a gift for trustee and beneficiary are one. The charitable corporation is not bound by all the limitations and rules which apply to a technical trustee. It may not, however, receive a gift made for one purpose and use it for another, unless the Court applying the cy pres doctrine so commands."

In *Barnum v. Baltimore* (1884) 62 Md. 275, the Court in sustaining, as creating a valid trust, a testamentary gift to a municipal corporation "in trust" for a certain education fund said:

"If there be (1) parties capable of taking the subject matter of the trust and (2) objects legal and definite, to be subserved or benefited by its execution, so that a Court of equity may take cognizance of and enforce the trust, these are the essentials and only essentials, to the validity of the trust, though the object of the trust be in its nature charitable. * * * The municipal corporation, taking the fund in trust, takes it for the benefit of its citizens or the public, to be applied according to the terms of the trust. It is, therefore, in a certain

sense, a cestui que trust as well as trustee. The property acquired by it, though in trust, is for public use; and the corporation is liable for the execution of the trust by and through the agencies it may create for the purpose."

To the same effect see *Crisp v. Crisp* (1886), 65 Md. 422; *Eutaw Place Baptist Church v. Shively*, 67 Md. 493; *Halsey v. Protestant Episcopal Church* (1892), 75 Md. 275. *Bennett v. Baltimore Humane Impartial Society* (1900), 91 Md. 10; *Trinity Methodist Episcopal Church South v. Baker* (1900), 91 Md. 539. In the last cited case one testamentary gift was to be applied to aid deserving and promising young women to attend the Women's Branch of the college through loans or scholarships, and another was for the education of one or more worthy girls. The Court, on the theory that no trust was created, stated:

"It is not given as a trust, as has been contended, but it is dedicated by the testatrix to an object directly within the general scope of the objects and purposes of the corporation. That the testatrix indicated the particular uses to which the fund is to be applied does not invalidate the gift";

See *Women's Foreign Missionary Society v. Mitchell* (1901), 93 Md. 199, 53 L. R. A. 711, in which the court sustained as not being a gift in trust, but as being a gift on condition, a bequest to a corporation in trust for the purpose of using a sufficient amount thereof to educate a certain number of girls in India as Bible readers and applying the rest to the purchase of a building to be used for the education of girls in India where these purposes were within the objects for which the corporation had been organized; *Baltzell v. Church Home & Infirmary* (1909), 110 Md. 224; *Gray v. Peter Gray Orphans' Home & Mechanical Institute* (1916), 128 Md. 592; *Conner v. Trinity Reformed Church* (1916), 129 Md. 360; *Van Reuth v. Baltimore* (1934), 165 Md. 651; *Art Student's League v. Hinkley*,

31 Fed. (2d) 469, affirmed 37 Fed. (2d) 225, Certiorari Denied 281 U. S. 733, 74 L. Ed. 1149.

We have found no decision in Maryland since the Act of 1931, Chapter 453, Section 268 (a), Article 16 of the Maryland Code, Supp. 1945. However, it may well be that this statute may lead the Maryland Courts hereafter to declare that gifts to charitable corporations, for the furtherance of particular corporate purposes, create charitable trusts and will be enforceable as such. This we conclude would seem to be inevitable, notwithstanding the contrary decisions, because the reason for the rule having been eliminated the rule itself falls. We recognize that the authorities cited are practically all based upon testamentary bequests. However the rule is the same whether the gift is testamentary or *inter vivos*.

Thus it appears that the gift by Mrs. Swift to the American University and the creation of the Swift Fellowship therefrom either constitutes (a) a charitable trust or, (b) a gift restricted to the use designated in the Fellowship. In either case the appellee must administer the fund in accordance with the purpose and intent determined upon in 1913 and 1914 when the Fellowship was financed and created. That was done while the creators of the Fellowship were living, and up until 1942. This late effort on the part of the American University to change the terms and conditions of the Fellowship, and the use of the funds for which it was endowed, is without validity and should not be recognized either in law or equity.

The resolution of the Board of Trustees of appellee University, dated April 9, 1942, finds no support in either the records of the University or in the testimony presented on its behalf at the trial. As heretofore stated, the facts are entirely to the contrary of the contentions of the appellee. The resolution is therefore invalid in that it is an attempt to change the terms and conditions of the Fellowship, as originally financed and established, so that the American University having solicited and received the gift for one

purpose could now use it for another. In the face of the facts of record such action as contemplated under the aforesaid resolution, balanced with the 25 years course of conduct to the contrary, makes manifest that the resolution is arbitrary, illegal, in breach of the terms and conditions of the Fellowship, and without force or effect.

CONCLUSION.

The admissions in the pleadings and the facts established at the trial show beyond question that the recipients of the Gustavus F. Swift Fellowship Award shall: (a) be graduates of Garrett Biblical Institute, appellant, and (b) have the right and privilege of pursuing "their studies at seats of learning or at places of study and investigation within the United States * * * or abroad." After 25 years of administering this fund and Fellowship in such manner as to accomplish these purposes, this late effort by the American University, on April 9, 1942, to so change its terms and conditions as to compel recipients of the Fellowship to attend the American University is in violation of the terms and conditions of the gift and Fellowship, and is, therefore, invalid.

The judgment of the trial Court should be reversed and the case remanded to that Court with direction to enter a judgment for appellant.

Respectfully submitted,

WALTER M. BASTIAN,

A. K. SHIPE,

Attorneys for Appellant,

National Press Building,

Washington 4, D. C.

APPENDIX

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,449

GARRETT BIBLICAL INSTITUTE, *Appellant*

v.

THE AMERICAN UNIVERSITY, a Corporation, *Appellee*

Appeal from the United States Court for the
District of Columbia.

JOINT APPENDIX.

I.

**PLEADINGS, DOCKET ENTRIES AND
OTHER PAPERS.**

144

Filed March 25, 1946

In the District Court of the United States for the District
of Columbia

Civil Action No. 33904

THE AMERICAN UNIVERSITY, a corporation, Nebraska Avenue
and Massachusetts Avenue, N.W., Washington, D. C.,
Plaintiff,

vs.

THE GARRETT BIBLICAL INSTITUTE, Evanston, Illinois,
Defendant.

Complaint for a Declaratory Judgment.

1. Plaintiff is a corporation organized and existing under a special Act of Congress approved February 24, 1893, amended by a special Act of Congress approved March 2, 1895, and conducts its principal corporate activities in the District of Columbia, with offices at the University campus at Nebraska Avenue and Massachusetts Avenue, N.W., and at 1901 F Street, N.W., in the District of Columbia.

The defendant is a corporation organized and existing under the laws of the State of Illinois and maintains its principal office at Evanston, Illinois. This action is brought under the Act of Congress approved June 14, 1934, commonly known as the Declaratory Judgment Act, 48 Stat. 955. The amount in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars.

2. In and by said act of incorporation of the plaintiff the Congress of the United States named certain persons and recited that those persons, "and their associates and successors, two-thirds of whom shall at all times be mem-

bers of the Methodist Episcopal Church, are hereby constituted a body politic and corporate by the name of THE AMERICAN UNIVERSITY, with power to sue and to
 145 be sued, and to be impleaded, and for perpetual succession; * * * to choose a Board of Trustees * * * , which board shall be authorized to appoint such officers and agents as the business of the corporation shall require and to make by-laws for the accomplishment of its purposes, for the management of its property and for the regulation of its affairs. Said corporation is hereby empowered to establish and maintain within the District of Columbia, a university for the promotion of education. The said corporation shall have power to grant and confer diplomas and the usual college and university degrees, and honorary degrees, and also such other powers as may be necessary fully to carry out and execute the general purpose of the said corporation as herein appearing."

The said Amendatory Act constituted the persons named in the first act, their associates and successors, as the Board of Trustees by which the business of said corporation should be transacted, and changed the number of trustees and the number necessary for a quorum.

3. The controversy which has arisen between the parties hereto, which is hereinafter more fully set forth and described, concerns the application and disposition by plaintiff of a portion of its invested capital funds and the income therefrom. The controversy arises, immediately, out of action taken by plaintiff in 1942 changing the manner and terms of application and disposition of a \$16,000 fund and the income therefrom, which for many years has been generally known and referred to as the Swift Fellowship. Plaintiff believes and asserts that, in the absence of contrary limitation validly imposed by the donor of funds held by it or the vesting of rights therein in others, it has and
 146 at all times has had the right, power, and authority to control and direct and to vary from time to time, as it sees fit, the application and disposition of such

funds and the income therefrom; and it believes and asserts that the Swift Fellowship is and at all times has been within this category and that its actions with respect thereto have been and are within its discretion and powers, and the authority of the aforesaid statutes, and are valid. Defendant disputes the foregoing; it contends that plaintiff has through many years established and followed a course of conduct with respect to the Swift Fellowship which, though entirely voluntary on plaintiff's part, precluded the latter's action of 1942.

4. Following the enactment of the enabling legislation in 1893 and 1895, The American University embarked on a program looking to the physical and scholastic establishment of the University as a functioning educational institution. This program continued through the years up to 1914 when, on May 27, 1914, the University celebrated its official Opening Day. During this period the University officials were concerned greatly with the matter of assembling financial strength, acquiring physical properties, and formulating the educational structure of the institution. Many gifts of funds and property were obtained; a campus at Massachusetts and Nebraska Avenues, N.W., Washington, D. C., was acquired and the original two buildings of the University erected thereon; and various features of the University's scholastic program were formulated and published. An important instrument in the prosecution of these efforts was the dissemination by the University of The American University Courier, its official quarterly publication, of which Albert Osborn, then Registrar and Assistant Secretary of the University, was the editor. The

Courier served, among other things, to publicize the
 147 work that was being done, to announce the advantages which the University would offer, and to enlist the participation of its many benefactors.

In the years 1913 and 1914 the University brought forward a plan for development and promotion of education through scholarships and fellowships.

In Vol. XX No. 3, of the Courier, dated December 1913, the University caused to be made the following public announcement:

“\$16,000 for a Fellowship in
The American University

“Sixteen thousand dollars will endow a fellowship in The American University. We have settled on this amount for the reason that we cannot count with certainty upon much more than $4\frac{1}{2}$ per cent returns from capital invested in such securities as trust funds require. And the amount of money which is set to support a fellowship ought to furnish a net return of from \$600 to \$700 annually.

“What nobler way is there than this to commemorate one's own life interest or to erect a memorial to a loved relative or friend? By this means money can be dedicated to useful ends for all time. But more, here is the best method yet devised for granting some worthy young man or woman just that one supreme chance in life which will mean the difference between being hidden in the common-place ranks of work and being enabled to serve as a leader in the fight for God and humanity. Who does not know of some youthful aspiring heart yearning for this supreme chance in life? To train true inspiring leaders is to give our age its heavenly leaven. Help now by endowing a fellowship.”

148 In Volume XXI, No. 3, of the Courier, dated December 1914, being the first official catalogue published by The American University, copy of which is filed herewith, marked Exhibit A, and made part hereof, the announcement of a fellowship plan was made public, on page 16, as follows:

“FELLOWSHIPS

“The policy of distributed efficiency is one of the vital elements of the university. This policy is put into operation through the medium of university fellowships. This plan of fellowships will afford opportunities for covering the whole field of knowledge, and thus will complete the scheme of university study beyond what is afforded at Washington.

"So far as practicable such fellowships will be established and supported from the university funds. To students who thus are granted fellowships there will be opened at once the highest academic opportunities; for a fellowship will enable a student to pursue work at the institution and in the environment which for his purpose shall offer the largest possible advantages.

"FELLOWSHIPS OF TWO CLASSES

"(A) Fellows who pursue their studies at seats of learning or at places of study and investigation within the United States. A fellow of Class A shall receive a stipend of \$600 per annum.

"(B) Fellows who pursue studies at foreign seats of learning or at places of study and investigation abroad. A fellow of Class B shall receive a stipend of \$800 per annum.

149

"ADMISSION TO FELLOWSHIPS

"Students shall be admitted to fellowships upon the nomination of the school, college or university from which the candidate holds a baccalaureate or higher university degree. The nomination, however, is subject to confirmation by the officers of The American University and by the Board of Award.

"TENURE OF FELLOWSHIPS

"Appointment to a fellowship shall be for one year, subject to renewal for a second year. In special cases a fellowship may be held for a third year, but no longer. The officers of The American University shall decide upon the length of the term of each fellow.

"THE WORK OF A FELLOW

"A fellow shall pursue study in such subject or subjects and at such seats of learning or at such places as shall be recommended by his nominating school, college or university, subject to the approval of the officers of The American University. During the pursuit of such study the student shall be classified as a fellow of The American University, and he must make a semi-annual report to the authorities of The American University concerning his work. Where the study is made under the auspices of some other academic institution

each report from the fellow shall be accompanied by an official statement from that institution. The second semi-annual report must be in the hands of the officers of The American University thirty days before the date of the University Convocation.

150 "APPLICATION FOR FELLOWSHIP

"Candidates for fellowships in the university will apply to the registrar, Mr. Osborn, for application blanks. These blanks when made out must receive the endorsement of the institution which granted the candidate his or her baccalaureate or other subsequent degree. The fact that the same institution thus may be called upon to endorse the application of several of its alumni in no case will militate against any applicant, since the final choice of the fellow is made by the Board of Award of The American University.

"It is also to be borne in mind that, since actual rank in the classes of the institution which recommends the candidate will not decide the final selection of a fellow, any additional fact or information concerning the candidate that bears on such selection is desired by the Board of Award. Such information might be classed under the heads; health, life-plan, character, qualities for leadership, personal initiative, etc. Such information may be furnished by reputable persons best acquainted with the candidate.

"After the blanks have been filled out in accordance with the printed directions they are to be forwarded to the registrar of The American University. They then will be transmitted to the Board of Award, who will take final action upon them. If desired by the Board of Award the candidate must be prepared to appear before the board to answer any inquiries or to meet such tests as the board may order."

151 5. Of the multitude of persons who at various times in its history have made gifts to The American University, one of its more generous benefactors was Mrs. Annie M. Swift of Chicago, Illinois, now deceased. Over the years 1905, 1907, 1909, 1913 through 1917 and 1921, she made numerous gifts to the University which aggregated the sum of \$56,000; and, finally, by her will she gave

the University in 1923, the sum of \$25,000, making the total of her benefactions to the University \$81,500. In connection with its plans, the University in 1914 allotted three of Mrs. Swift's donations (those of September 30, 1913, January 17, 1914, and July 6, 1914, in the sums of \$5,000, \$6,000, and \$5,000, respectively) to make up an aggregate principal of \$16,000 to finance what appears to have been its first fellowship, which, in honor of the deceased husband of Mrs. Swift, it named the Gustavus F. Swift Fellowship.

A large portion of Mrs. Swift's gifts to the University were made without restriction as to their use, and the aforementioned gifts of \$5,000, \$6,000, and \$5,000 were so made, with the exception that there is indication that the \$5,000 gift of July 6, 1914, was by her prescribed to be used "for endowment purposes." The latter quotation is from a letter to the University dated May 12, 1914, signed by Mrs. Swift, a copy of which is attached hereto, marked Exhibit B, and made a part hereof. The University records do not disclose any other restriction upon any of these three gifts, and all persons then connected with the University are now deceased.

The University provided that the recipient of the Swift Fellowship should be selected in the following manner: Garrett Biblical Institute, defendant herein, was to recommend one or more of its graduates annually and
 152 if one received the approval of The American University he was to become the Gustavus F. Swift Fellow for one year, and receive one year's income from the said fund.

In the December, 1914, issue of the Courier (Vol. XXI, No. 3, page 18) (Exhibit A aforesaid), the University announced and offered the Swift Fellowship in the following terms:

"Gustavus F. Swift Fellowship.

"Through the generous gift of Mrs. Gustavus F. Swift there has been endowed a fellowship in memory of her husband, the late Mr. Gustavus F. Swift, of

Chicago, Illinois. This fellowship will afford an estimated income of about seven hundred and fifty dollars each year. The incumbent of the fellowship is to be a graduate of Garrett Biblical Institute."

6. Commencing with the year 1915 and continuing through 1941, the University each year awarded a Gustavus F. Swift fellowship. In each instance the recipient was a graduate of Garrett Biblical Institute, certified by the latter institution to the former and approved by it. The practice was to have Garrett Biblical Institute certify two of its graduates and The American University to select one of the two, but it was well understood that The American University might reject both and require Garrett Biblical Institute to submit additional names.

In making each of these awards The American University refrained from attaching any restriction as to the institution or geographical location in which the recipient should pursue his studies; no declaration was made by the University, however, negating the possibility
153 of such restriction or other change in the terms and conditions of the offering and award.

7. The University was first organized as a graduate school and officially opened (May 27, 1914) with only two buildings and a small group of professors. From this small beginning, the institution has made rapid growth. The first undergraduate division was established in 1925, graduating its first class in 1929. In 1934 the School of Public Affairs was established and, in 1941, the School of Social Science and Public Affairs was organized by the administrative consolidation of the Graduate School and the School of Public Affairs. During the decade which followed the organization of the School of Public Affairs, foundation grants totaling almost \$100,000 made possible the development of different fields of work. Grants were made by the Carnegie Foundation, Rockefeller Foundation, Milbank Fund and the American Council of Learned Societies. In 1945 the Alfred P. Sloan Foundation established within the

School of Social Sciences and Public Affairs a Teaching Institute of Economics by a grant equivalent to the income of a million dollars.

As constituted today the University has grown to include a modern college of Arts and Sciences, School of Nursing, Teaching Institute of Economics and a number of Professional Institutes such as the Institute on Rail Transportation, the Institute on Federal Taxation, The Short Story Writing Conference, The Institute on the United States and World Affairs, conducted during the summer for secondary school teachers, and other special Professional Institutes for graduate and undergraduate students and adult leaders.

The University is rendering noteworthy service to the clergy. The Annual Washington Graduate Seminar, 154 sponsored by the Commission on Ministerial Training of the Board of Education of the Methodist Church, includes in its enrollment ministers from many sections of the United States who since 1944 have come to the campus of The American University for study; the enrollment of graduate students includes a number of important ministerial candidates for the degree of Doctor of Philosophy, especially in the field of Church administration, who are drawn from all over the country; correspondence courses serve the many who cannot come here.

The late Bishop McDowell who for twenty years was actively interested in the University and a member of its Board of Trustees, and in whose memory the William Fraser McDowell Chair of Religion was established in 1938, in one of his last public utterances said, "The American University seems to me to have a meaning for modern evangelical Protestantism and a living internationalism that cannot be overestimated."

Since the establishment of the School of Public Affairs as aforementioned, the University has devoted its work largely to the broader phases of social science and the institutions which serve society. The program of instruction

and research is designed to lay a broad foundation for the understanding of the problems of human group relations and to develop a high standard of professional skill and technical competence in dealing with the control and direction of society. The University is thus now equipped to be a place of study looking to the accomplishment of the highest learning.

155 8. On April 9, 1942, the Board of Trustees of The American University adopted the following resolution concerning the Swift fellowship:

"Whereas the Board of Trustees has caused to be made a careful search of documents relating to the terms of the award of a fellowship granted under income from the funds bearing the name of Anna M. Swift; and

"Whereas these documents, together with the attending circumstances of the gift make it clear that the original gift was to enable a student, nominated by the faculty of Garrett Biblical Institute, to study in the graduate division of The American University in Washington, D. C.

"Therefore, be it resolved, that the Board of Trustees, in accordance with its understanding of the terms of the original gift, define the conditions of award on and after April 9, 1942, as follows:

"1. The income from the endowment fund bearing the name of Anna M. Swift shall be made available annually for the support of a graduate fellowship for study in The American University.

"2. The fellowship shall be awarded by the University to a student nominated by the Faculty of Garrett Biblical Institute."

A copy of this resolution was transmitted on May 14, 1942, by the President of the University to the President of the Garrett Biblical Institute. Copy of the letter of transmittal is attached hereto, marked Exhibit C, and made a part hereof.

9. Thereafter on May 27, 1942, defendant nominated two of its graduates to the plaintiff as proposed recipients of the Gustavus F. Swift Fellowship, by letter, copy of which

is attached hereto, marked Exhibit D, and made a part hereof. Plaintiff, by letter dated June 12, 1942, notified defendant that it had awarded the fellowship to one of said nominees, Mr. Paul Marsh Pettit, for the academic year 1942-43, "according to the action of the Board of Trustees of The American University for study in the Graduate Division of The American University in Washington, D. C."

Copy of said letter is attached hereto, marked Exhibit 156 E, and made a part hereof. On June 12, 1942, the plaintiff, by letters written by its President and the Dean of its Graduate Division, notified said nominee, Mr. Pettit, that the fellowship had been awarded to him, specifying study in the Graduate Division in The American University for the academic year 1942-1943. Copies of said letters are attached hereto, marked respectively Exhibits F and G, and made a part hereof. Said Pettit answered by letter dated June 28, 1942, disregarding the specification for study in the Graduate Division of The American University, and stated that he understood he was free to choose the institution in which he would pursue his graduate studies and he had not yet decided in what school he would do so. Copy of this letter is hereto attached, marked Exhibit H, and made a part hereof.

On June 30, 1942, President Smith of Garrett Biblical Institute wrote President Douglass of The American University giving formal notification that the Swift Fellowship was announced at the Annual Convocation of the Garrett Biblical Institute as an award given to Mr. Paul Marsh Pettit, and that the latter understands that in accordance with the established practice of The American University he is free to choose the institution where he is to pursue his graduate study, and further stating that "In due time that decision will be made so that payments can be forwarded to him." Copy of that latter is attached hereto, marked Exhibit I, and made a part hereof. Further correspondence followed, consisting of a letter by President Douglass of The American University to Mr. Pettit, dated July 1, 1942,

and another dated August 24, 1942, and an answering letter by Mr. Pettit to President Douglass, dated October 9, 1942, in which he stated that on the advice of responsible
 157 persons at Garrett Biblical Institute, he had enrolled for graduate study in Union Theological Seminary, New York City, and requested the first payment from the Swift Fellowship. Copies of said three letters are attached hereto, marked respectively Exhibits J, K and L, and made a part hereof.

On October 12, 1942, the President of The American University wrote Mr. Pettit that the award of the Swift Fellowship, by action of the Board of Trustees of The American University, was for study in Washington, and that this was clearly stated in the award made to him and his acceptance was conditioned upon the terms of such award, and expressed regret that he would be unable to make the payment requested by him on October 9, 1942, and further stated that he assumed from Mr. Pettit's letter of October 9th that it was notice to The American University that he had elected not to accept the fellowship under the terms of the award. A copy of said letter is attached hereto, marked Exhibit M and made a part hereof. No further claim for these fellowship funds has been made by Mr. Pettit upon the plaintiff.

10. Thereafter correspondence was exchanged by the Presidents and other officers of the two institutions, further evidencing the controversy hereby submitted to this Honorable Court for decision. Copies of these letters are attached hereto, marked consecutively Exhibits N through P, and made a part hereof. Particularly, defendant objected to plaintiff's designating the graduate school of The American University as the place of study of the recipient of the Swift Fellowship. Plaintiff's position was and is: that its Board of Trustees had full authority and power to take this action, and, as well, to do all other acts in its discretion deemed proper in the administration of these funds; that
 158 its actions, from the beginning, in the application and disposition of the funds involved herein were entirely

voluntary on its part, and that its having voluntarily adhered for a period of years to one plan with respect thereto in no wise circumscribed, restricted, or impaired its right, power and authority to vary or change the same from time to time, in part or in whole, as it, in its discretion, might see fit; and that the action of its Board of Trustees of April 9, 1942, wherein it specified the graduate school of The American University as the place of study of the recipient of the Swift Fellowship, was in all respects valid and so continues. And plaintiff asserts that its educational facilities as expanded and developed since 1915 and especially in and after 1941, and the unlimited research facilities of the Nation's Capital which are constantly availed of by the plaintiff, fully justify the decision of its Board of Trustees in defining the conditions of award of the Swift Fellowship.

11. During defendant's refusal to make nominations of its graduates to this Fellowship, plaintiff has continued to maintain the capital fund and has allowed to accumulate the income therefrom, which accumulation during and since 1942 now exceeds \$3,000. Plaintiff does not believe, however, that it can prudently or properly continue indefinitely to permit the stagnation of these funds.

By reason of defendant's assertions with regard to these funds and its threats of legal action to enforce its alleged rights, plaintiff is in doubt as to its rights, powers, and authority with respect thereto. An actual controversy exists between plaintiff and defendant as to these funds; and plaintiff seeks early judicial determination thereof and dissolution of the concomitant doubt.

WHEREFORE, plaintiff demands that the Court adjudge:

159 1. That the principal of the funds here immediately involved, and used to finance the Gustavus F. Swift Fellowship, are a part of the general invested capital funds of The American University and that the University at all

times has had and continues to have full right, power, and authority to administer the said capital funds and the income therefrom, including those used to finance the said fellowship, with full right, power, and authority to determine and effect, and from time to time to vary or change, in part or in whole, the application and disposition of all of its said funds, capital and income, as it, in its discretion, may see fit, within the limits of the special Acts of Congress approved February 24, 1893 and March 2, 1895, subject only to any restrictions validly imposed by a donor or bindingly undertaken by the University, or vested rights of others with respect thereto; and that the funds here immediately involved are not and never have been subject to any restrictions or any vested rights of others than the University with respect to administration, application, or disposition thereof; and that the action embodied in the resolution adopted by the Board of Trustees of The American University April 9, 1942, with regard to the funds here immediately involved was and continues to be in all respects valid and does not infringe any right of the defendant Garrett Biblical Institute; or alternatively,

2. That The American University at all times has had and continues to have full right, power, and authority to administer the funds here immediately involved, and used to finance the Gustavus F. Swift Fellowship, principal and income, with full right, power, and authority to determine and effect, and from time to time to vary or change, in part or in whole, the application and disposition thereof as it, in its discretion, may see fit, within the limits of the special

Acts of Congress approved February 24, 1893, and
 160 March 2, 1895, without any restrictions imposed by the donor or bindingly undertaken by the University, and that the action embodied in the resolution April 9, 1942, with regard to the said funds was and continues to be in all respects valid and does not infringe any right of the defendant Garrett Biblical Institute; or alternatively,

3. That the plaintiff herein shall have such other and fur-

ther alternative relief as the nature of the case may require and as to the Court may seem just and proper.

THE AMERICAN UNIVERSITY,

By PAUL F. DOUGLASS,
President

COLLODAY, COLLODAY & WALLACE

1331 G Street, N. W.

Washington, D. C.

Attorneys for the plaintiff

E. F. COLLODAY

D. C. COLLODAY

HENRY F. LERCH

161 DISTRICT OF COLUMBIA, ss:

Paul F. Douglass, being sworn, deposes and says: I am a resident of the District of Columbia and am the President of The American University, the plaintiff above named; I have read the foregoing Complaint for a Declaratory Judgment and know the contents thereof and verily believe the same to be true.

PAUL F. DOUGLASS

Subscribed and sworn to before me this 25th day of March, 1946.

GERALD E. TUNE

*Notary Public for the
District of Columbia.*

My commission expires: September 1, 1947.

* * * * *

Exhibit B.

Chicago, Ill., May 12th, 1914.

Trustees,
American University,
Washington, D. C.

Dear Sirs:-

According to my records, I have agreed, Oct. 1st, 1914, to give to American University, to be used as endowment, the sum of \$5,000.00.

It is my understanding that Swift & Company are issuing some first Mortgage 5% Thirty Year Sinking Fund Gold Bonds, dated July 1st, 1914; and it occurs to me that inasmuch as my contribution is to be used for endowment purposes you would perhaps prefer to have the amount turned over in a good investment and I write to inquire if it would be satisfactory to you to accept Swift & Company bonds at par of \$1,000.00 in lieu of cash.

If you prefer to have the cash, it is satisfactory to me.

For your further information, I am enclosing you herewith circular which has been gotten out by the underwriters, describing the bonds in some detail, and I am sure the Secretary of Swift & Company would be glad to answer any further questions.

Awaiting your reply, I am

Yours very truly,

ANNIE M. SWIFT.

Mrs. G. F. Swift,
4848 Ellis Ave.
Chicago, Ill.

Exhibit C.

THE AMERICAN UNIVERSITY
WASHINGTON, D. C.

Office of the President

May 14, 1942.

President Horace G. Smith,
Garrett Biblical Institute,
Evanston, Illinois.

Dear President Smith:

I am enclosing a copy of a resolution adopted by the Board of Trustees of The American University at its meeting on April 9, 1942. A similar action was taken concerning all fellowship funds of the University as a result of a careful study of the history and interest of the trusts.

We shall appreciate so much having the appointment to announce at Commencement. If your appointee desires accommodations in our residence halls, we shall be pleased to make the necessary reservation.

Very sincerely yours,

PAUL F. DOUGLASS,
President.

PFD/W

Exhibit D.

GARRETT BIBLICAL INSTITUTE
OFFICE OF THE PRESIDENT
EVANSTON, ILLINOIS

May 27, 1942

My dear Dr. Stout:

In accordance with past practice, we are sending to you the applications of two men who have been recommended for the Swift Fellowship. The faculty committee has asked me to advise you that our distinct preference is for Mr.

William Clifford Manning. In line with past precedents, however, we nominate two men.

Respectfully yours,

HORACE G. SMITH.

Dr. Hiram M. Stout, Director,
The School of Social Sciences and Public Affairs,
The American University,
Washington, D. C.

HGS:EJT

Enc.

Exhibit E.

THE AMERICAN UNIVERSITY
WASHINGTON, D. C.

Office of the President

June 12, 1942

President Horace G. Smith
Garrett Biblical Institute
Evanston, Illinois

Dear President Smith:

The American University takes pleasure in advising you of the appointment of Mr. Paul Marsh Pettit as Swift Fellow for the year 1942-43.

The award of the Swift Fellowship to Mr. Pettit is made, according to the action of the Board of Trustees of The American University, for study in the Graduate Division of The American University in Washington, D. C.

We look forward with great pleasure to having Mr. Pettit with us next year.

Very sincerely yours,

PAUL F. DOUGLASS,
President.

PFD:ECP

Exhibit F.

THE AMERICAN UNIVERSITY
WASHINGTON, D. C.

Office of the President

June 12, 1942

Mr. Paul Marsh Pettit
Garrett Biblical Institute
Evanston, Illinois

Dear Mr. Pettit:

I take pleasure in advising you of your appointment as Swift Fellow in the Graduate Division of The American University for the academic year of 1942-43. Dean James J. Robbins of the Graduate Division is writing you a personal note.

I am sure that you will want to make reservations for your living accommodations while you are a student here. If you should desire to live in Hamilton House, the men's residence hall, we shall be glad to send you applications blanks at once.

We are all looking forward to having you with us. I send the greetings of Bishop Leonard, Chairman of our Board of Trustees, who will take a personal interest in you.

Very sincerely yours,

PAUL F. DOUGLASS,
President.

PFD:ECP

Exhibit G.

THE AMERICAN UNIVERSITY
WASHINGTON, D. C.

Office of the President

June 12, 1942

Mr. Paul Marsh Pettit
Garrett Biblical Institute
Evanston, Illinois

Dear Mr. Pettit:

It is a great pleasure to learn that you have been appointed Swift Fellow in The American University for the academic year 1942-43.

As you know, under the present terms of the award, the Swift Fellow studies in the Graduate Division of The American University in Washington, D. C. I shall be pleased to assist you in planning your program of graduate work if you will write me about your special interests.

Our new catalog is now in preparation and a copy will be sent you in a few days. You will find Washington rich in resources for the pursuance of your education. I am sure that the days which you spend in Washington will be tremendously profitable as you prepare for your career.

Very sincerely yours,

JAMES J. ROBBINS,
Dean, Graduate Division

JJR:ECP

Exhibit H.

Arrowsmith, Illinois
June 28, 1942

Dr. Paul F. Douglass
The American University
1901 F Street, Northwest
Washington, D. C.

Dear Sir:

Your letter of June 12, in which you inform me of my appointment as Swift Fellow, reached me during Commencement activities at Garrett Biblical Institute.

Let me express my own appreciation to you and to the Board of Trustees of American University for granting me this fellowship. I hope that I may be worthy of the confidence you have shown in granting it.

It is my understanding and that of Garrett Biblical Institute that the recipient of the Swift Fellowship is free to choose the institution in which he will pursue his graduate studies. Since the news of this fellowship came as somewhat of a surprise to me, I have not yet decided in what school I will do my work next year.

I am grateful to you and to Dean Robbins for your gracious letters telling me of the award, and for your offers to assist me in planning my graduate work. I am interested in doing my graduating work in the field of theology, and am now examining the opportunities in that field available at various universities.

If you should wish to communicate with me further in regard to the fellowship, you may address me at Arrowsmith, Illinois, where I shall spend the summer. Thank you again for your kind consideration in this matter.

Very truly yours,

PAUL M. PETTIT.

Exhibit I.

GARRETT BIBLICAL INSTITUTE
OFFICE OF THE PRESIDENT
EVANSTON, ILLINOIS

June 30, 1942

My dear President Douglass:

This will be formal notification that the Swift Fellowship was announced at our Annual Convocation as an award given to Mr. Paul Marsh Pettitt. He understands that in accordance with established practice that he is free to choose the institution where he is to pursue graduate study. In due time that decision will be made so that payments can be forwarded to him.

Very respectfully yours,

HORACE G. SMITH,

President Paul F. Douglass,
The American University,
Washington, D. C.

HGS:EJT

Exhibit J.

THE AMERICAN UNIVERSITY
WASHINGTON, D. C.

Office of the President

July 1, 1942

Mr. Paul M. Pettit
Arrowsmith, Illinois

Dear Mr. Pettit:

Your impression of the conditions of the award of the Swift Fellowship is not correct. The Swift Fellowship is now awarded for study in Washington only.

I shall be pleased to assist you in working out any kind of a program which interests you in the various cooperative

arrangements which we have with the institutions in Washington.

It occurred to me that you might be interested also in a kind of internship relationship with one of the larger churches here. If so, that can be arranged.

I am sure that your experience in Washington will be one of the richest ones in your life. If you desire living accommodations in the University, we shall be delighted to make reservations for you.

Very sincerely yours,

PAUL F. DOUGLASS,
President.

Exhibit K.

THE AMERICAN UNIVERSITY
WASHINGTON, D. C.

Office of the President

August 24, 1942

Mr. Paul M. Pettit
Arrowsmith, Illinois

Dear Mr. Pettit:

We are looking forward to having you with us this fall and are wondering if you desire to have a room reserved in the residence hall.

I hope that there is no doubt in your mind about the terms of the award. The terms as stated by the Board of Trustees require study in The American University in Washington, D. C.

No payments will be made under any other circumstances and it is our understanding that you accepted this fellowship under these terms.

Very sincerely yours,

PAUL F. DOUGLASS,
President.

PFD:ECP

Exhibit L.

Hastings Hall
Union Theological Seminary
New York City
October 9, 1942

Dr. Paul F. Douglass, Chancellor
American University
Washington, D. C.

Dear Mr. Douglass:

As you know, I was made the recipient of the Swift Fellowship in the graduating class of Garrett Biblical Institute last June.

Upon the advice of responsible persons there, I enrolled for graduate study here in Union Theological Seminary, where I can pursue study for the degree of Master of Theology.

I have further been assured by Garrett that the first payment of the Swift Fellowship should now be forthcoming, and I have contracted obligations here which make that payment necessary before November 1.

Therefore, I should appreciate your immediate attention to this matter, in sending first payment on the Swift Fellowship to me at the above address.

Respectfully yours,

PAUL M. PETTIT.

Exhibit M.

THE AMERICAN UNIVERSITY
WASHINGTON, D. C.

Office of the President

October 12, 1942.

Mr. Paul M. Pettit
Hastings Hall,
Union Theological Seminary,
New York, New York.

Dear Mr. Pettit:

The award of the Swift Fellowship by action of our Board of Trustees was for study in Washington. This was clearly stated in the award to you and your acceptance was conditioned upon the terms of our award. I regret that we shall be unable to make the payment suggested in your letter of October 9.

We shall be pleased, as I have mentioned before, to discuss a program of study in Washington. I assume that your letter of October 9 is notice to us that you have elected not to accept the fellowship under the terms of the award.

Very sincerely yours,

PAUL F. DOUGLASS,
President.

PFD/W

Exhibit N.

HARRY A. WHEELER
38 SOUTH DEARBORN STREET
CHICAGO

October 28, 1942.

Bishop Adna W. Leonard,
Chairman of the Board of Trustees,
American University,
1100 Maryland Avenue, N.E.,
Washington, D. C.

Dear Bishop Leonard:

I am enclosing herewith a copy of President Douglass' letter to Paul M. Pettit, to whom the Swift fellowship was granted by the Garrett Biblical Institute. If this is the final answer of the American University, whose President has thus far ignored our request for a copy of the documents in the Swift's Fellowship that warrant a change from the course that has been followed for nearly a quarter of a century, the American University leaves us no other course than to discuss the matter with the members of the Swift family, and thereafter to take such action as will compel the Trustees of the American University to present to a proper court the documents upon which their recent decision has been reached.

Personally, I deeply regret the necessity to press our case, but no other course remains, unless your appeal to the Trustees of the American University will incline them to reply to our letters on this subject.

Very sincerely yours,

HARRY A. WHEELER,
*President, Board of Trustees,
Garrett Biblical Institute.*

Exhibit M.

THE AMERICAN UNIVERSITY
WASHINGTON, D. C.

Office of the President

October 12, 1942.

Mr. Paul M. Pettit
Hastings Hall,
Union Theological Seminary,
New York, New York.

Dear Mr. Pettit:

The award of the Swift Fellowship by action of our Board of Trustees was for study in Washington. This was clearly stated in the award to you and your acceptance was conditioned upon the terms of our award. I regret that we shall be unable to make the payment suggested in your letter of October 9.

We shall be pleased, as I have mentioned before, to discuss a program of study in Washington. I assume that your letter of October 9 is notice to us that you have elected not to accept the fellowship under the terms of the award.

Very sincerely yours,

PAUL F. DOUGLASS,
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Personally, I deeply regret the necessity to press our case, but no other course remains, unless your appeal to the Trustees of the American University will incline them to reply to our letters on this subject.

Very sincerely yours,

HARRY A. WHEELER,
*President, Board of Trustees,
Garrett Biblical Institute.*

Exhibit O.

HARRY A. WHEELER
38 SOUTH DEARBORN STREET
CHICAGO

March 5, 1943.

Mr. E. F. Colladay,
Colladay, Colladay & Wallace,
1331 G Street, Northwest,
Washington, D. C.

Dear Mr. Colladay,

I have in my pending file a letter of yours dated December 4, 1942, and a copy of my reply to that letter dated December 7, 1942. It will shortly be three months since this correspondence, and at the last meeting of our Board of Trustees, I was asked what further had been done in the matter of the controversy between Garrett and the American University.

If I may again repeat what I have already said, there is a principle involved, and our Board is inclined to support that principle which is based upon a long actual experience between the two institutions and a sudden reversal of a course followed for twenty years or more without providing for our inspection any of the documents causing President Douglass and his Board to change an established custom.

Very sincerely yours,

HARRY A. WHEELER.

Exhibit P.

LAW OFFICES

WALTER M. BASTIAN

NATIONAL PRESS BUILDING

WASHINGTON, D. C.

ZONE 4

September 27, 1945

Edward F. Colladay, Esq.
1331 G Street, N.W.
Washington, D. C.

Dear Ed:

I have been directed to file a suit to construe a trust in which the American University and Garrett Biblical Institute are parties. I assume that you know of this situation.

Naturally, I do not want to do this until the University is afforded a final opportunity to discuss the matter. From my information it would appear that the position taken by the American University is entirely untenable. Will you be good enough to call me on receipt of this letter so that we may arrange a conference.

I might add that I am in this picture because of a good friend of American University who feels that the present position taken by the American University cannot be sustained.

With kind personal regards, I am,

Very truly yours,

WALTER M. BASTIAN.

WMB/vg

Filed Apr 10 1946

Answer and Counterclaim.

1.-2. Defendant admits the allegations contained in Paragraphs 1 and 2 of the complaint.

3. Answering Paragraph 3 of the complaint the defendant states that this controversy concerns the application and disposition of a \$16,000.00 fund and the income therefrom which has been known, referred to and treated by the plaintiff as the Swift Fellowship since 1914; and defendant states that the said \$16,000.00 represents a trust fund the income from which was said and is to be used by the plaintiff for a Swift Fellowship and for no other purpose; and that the said Swift Fellowship was to go to a graduate of the defendant Institute and that such recipient of the Fellowship could attend a school of learning, either in the United States or at a foreign seat of learning, as recommended by the defendant and selected by the recipient of the Fellowship. The defendant denies that the plaintiff has or ever had the right and power and authority to control and direct and to vary from time to time, as it sees fit, the application and disposition of the funds and income therefrom comprising the Swift Fellowship, and further states that the action of the plaintiff with respect thereto is without legal authority and constitutes a breach of the relationship created by the donor of the said Fellowship and the defendant. The defendant denies all other allegations in Paragraph 3 not herein specifically denied.

4. Defendant admits the allegations contained in Paragraph 4 of the complaint.

5. Answering the allegations of Paragraph 5 of the complaint defendant states that the \$16,000.00 mentioned therein was donated to the plaintiff and that the said sum that said Fellowship was created by mutual agreement between the plaintiff and the said Annie M. Swift of Chicago, Illinois. Defendant denies that there were no restrictions upon the said \$16,000.00 Fund but on the contrary states that

the said fund was created for the specific purpose of financing the Swift Fellowship and for no other purpose. Defendant states that the recipient of the Swift Fellowship must be a graduate of the Biblical Institute, and further states that said recipient may, under certain conditions receive more than one year's income from the said fund for educational purposes.

6. Defendant admits the allegations contained in the first paragraph of the allegations in Paragraph 6 of the complaint and denies the allegations in the second paragraph thereof. Further answering the allegations in the second paragraph of Paragraph 6 of the complaint the defendant states that the agreement by the parties at the time of the creation of the Swift Fellowship was that the recipient thereof may attend a school of learning, of his selection or that recommended by the defendant, other than the American University and that this is clearly recognized and established by the allegations contained in Paragraph 4, Pages 5 and 6 of the complaint; and defendant further states that the application for said Fellowship provides a space for the institution or place of proposed study for the applicant to designate.

7. Defendant is without sufficient information to admit or deny the allegations contained in Paragraph 7 of the complaint and further answering the said allegations states that the plaintiff, by reason of the large growth of the American University now seeks to change the terms and conditions under which the Swift Fellowship was constituted, as the plaintiff was not so equipped as to meet
 164 the conditions and terms of the said Fellowship then, and for many years after the creation of the said Swift Fellowship, and that the recent effort by the plaintiff to change the terms of the said Fellowship is a breach of the conditions and terms of the said Fellowship and constitutes a wrongful use of the funds sustaining and supporting said Fellowship and defendant states that the conditions, terms and restrictions originally imposed upon the creation

of the said Swift Fellowship must be strictly adhered to, regardless of the growth of the plaintiff University and regardless of the plaintiff now being equipped as a seat of learning to meet the educational requirements of a recipient of the said Fellowship.

8. Defendant admits the allegations contained in Paragraph 8 of the complaint but denies the validity of the resolution therein quoted and states that the said Resolution does not set forth the facts, conditions and terms upon which the said Swift Fellowship was formulated. The defendant admits that a copy of the said resolution was transmitted to the defendant as alleged by the plaintiff.

9. Defendant admits the allegations in Paragraph 9 of the complaint.

10. Defendant admits the allegations of fact contained in Paragraph 10 of the complaint. Defendant states that it is not required to answer the conclusions of the plaintiff set forth in Paragraph 10 of the complaint but defendant denies that the conclusions of the plaintiff as therein alleged are valid, and further states that the conclusions and actions of the plaintiff are without legal authority and are in contravention of the terms and conditions under which the said Swift Fellowship was constituted.

11. Answering Paragraph 11 of the complaint defendant states that plaintiff's refusal to comply with and carry out the terms and conditions of the said Swift Fellowship has precluded the defendant from having its graduates become recipients of the said Fellowship, and that defendant stands
165 ready and willing to recommeend its graduates for
said Fellowship upon the terms and conditions which
created the said Fellowship and under such conditions
as this Court may determine upon an interpretation and adjudication of the relationship between the parties hereto; and defendant further answering states that the fund of \$16,000.00 which created the Gustavus B. Swift Fellowship constitutes a trust fund in the hands of the plaintiff and that the plaintiff is compelled to administer such in accordance with the understanding of the parties thereto, and that the

defendant is entitled to recommend its graduates to the plaintiff, and that, upon approval by the plaintiff, the recipient of said Fellowship is entitled to attend a seat of learning of the choice of the defendant and of the said recipient.

Counterclaim.

For its counterclaim against the plaintiff, this defendant adopts the facts stated in the Answer herein, and the facts alleged in the complaint which are not denied.

WHEREFORE defendant demands that the Court declare:

1. That the Gustavus F. Swift Fellowship was endorsed in the amount of \$16,000.00 by Mrs. Gustavus F. Swift and announced by the plaintiff in December 1914 and that the incumbent of the Fellowship was to be a graduate of the Garrett Biblical Institute.

2. The said Fellowship contemplated that the recipient thereof might pursue further studies at seats of learning or places of study within the United States or foreign seats of learning.

3. That under the Gustavus F. Swift Fellowship the Garrett Biblical Institute was empowered to recommend the incumbent of the Fellowship from among its graduates, subject to the approval of the officers of the American University.

4. That in 1915 the first Swift Fellowship was awarded to M. J. Jones, a graduate of Garrett Biblical Institute and that from 1915 to and including 1941 the Swift Fellowship was awarded to a graduate of the Garrett Biblical Institute and that such recipients were at all times free to choose a university or college for attendance, either within
166 the United States or in foreign countries, free from any control whatever by the American University as to such choice of college or university.

5. That it was the intention of the American University and the donor Mrs. Gustavus F. Swift, in creating and setting up the Gustavus F. Swift Fellowship, that the in-

cumbent thereof must be a graduate of the Biblical Institute and that such graduate and recipient of said Fellowship, would have the right to attend a college or university selected by the Garrett Biblical Institute and chosen by the said recipient, and that such intention was faithfully adhered to by the parties from 1915 to and including 1941.

6. That on to wit, April 9, 1942 the plaintiff determined that the recipient of the said Fellowship should be required to attend American University, and so advised the defendant and the recipient of the said Fellowship for the year 1942.

7. That since 1942 plaintiff has refused to carry out the intention, terms and conditions of the said Gustavus F. Swift Fellowship and has refused to consider a graduate of the defendant Garrett Biblical Institute as an incumbent or a recipient of the said Swift Fellowship under the terms and conditions under which the said Fellowship was endowed, created and carried out over the period from 1915 - 1941, inclusive.

8. That the American University be directed to recognize a student of Garrett Biblical Institute as a proper incumbent or recipient of the said Swift Fellowship and that the said incumbent or recipient of the said Fellowship be permitted to attend a seat of learning in the United States or a foreign seat of learning as requested by the Garrett Biblical Institute and agreed to and accepted by the said incumbent or recipient of the Swift Fellowship.

9. That in the event of the failure and refusal of the American University to carry out the terms of this decree that it be removed as trustee of the said fund and that another trustee be substituted with directions and authority to carry out the terms of said trust as decreed herein.

WALTER M. BASTIAN

* * * * *

179

Filed Mar 1 1949

Pretrial Proceedings.**STATEMENT OF NATURE OF CASE:**

Action for declaratory judgment.

Annie Swift donated a fund to the plaintiff to establish a fellowship to which graduates of the defendant were to be eligible. For a number of years this fellowship was given for the purposes of study at any institution as approved by the plaintiff's representative. Later, the terms of the fellowship were changed by plaintiff so as to require the recipient to study at the University. Plaintiff asks for a declaratory judgment that plaintiff is within its rights in so changing the terms of the fellowship.

Defendant claims that the fellowship was created for the benefit of its graduates and that terms of the fellowship permitted the recipient to study at any appropriate institution and that the change requiring the recipient to study at the American University is unauthorized and a breach of the trust, and of the terms of the fellowship.

STIPULATIONS:

It is stipulated that all documents and records of the plaintiff bearing on this matter may be admitted in evidence without formal proof of genuineness or signature, subject to objections as to relevancy.

It is stipulated that in 1917 and 1918 Charles Stuart was president of the defendant.

It is stipulated that Annie Swift died in approximately October 1922.

D. C. COLLADAY

DATE February 28, 1949

Attorney for Plaintiff

A. K. SHIPE

ALEXANDER HOLTZOFF

Attorney for Defendant

Pretrial Judge

* * * * *

Findings of Fact and Conclusions of Law.*A. The Court finds as facts:*

1. Plaintiff is a corporation organized and existing under a special Act of Congress approved February 24, 1893, amended by a special Act of Congress approved March 2, 1895, and conducts its principal corporate activities in the District of Columbia, with offices at the University campus at Nebraska Avenue and Massachusetts Avenue, N. W., and at 1901 F Street, N. W., in the District of Columbia.

The defendant is a corporation organized and existing under the laws of the State of Illinois and maintains its principal office at Evanston, Illinois. The amount in controversy exceeds, exclusive of interest and costs, the sum of three thousand (\$3,000.00) dollars.

2. Following the enactment of the enabling legislation aforementioned, The American University entered upon a program looking to the physical and scholastic establishment of the university as a functioning educational institution, which program continued through the years up to the official opening day of the university on May 27, 1914. During this period financial strength and physical properties were acquired, and the educational structure of the institution was formulated. A campus was acquired
186 and the original two buildings were erected. In 1912 and 1913 the plaintiff university formulated and adopted a tentative plan for the opening of the university and the inauguration of academic work; this included a plan for development and promotion of education through scholarships and fellowships. The University in December, 1914, made public announcement thereof (Complaint, pages 3-7). This plan indicated that a fellow might pursue study in such subject or subjects and at such seats of learning or at such places as should be recommended by his nominating school, college, or university, subject to the approval of the officers of The American University.

3. Over the years 1905, 1907, 1909, 1913 through 1917, and 1921, Mrs. Ann M. Swift, now deceased, one of the most generous of the plaintiff university's many benefactors, made numerous gifts to the university which aggregated more than the sum of \$56,500.00; and, finally by her Will she gave the university in 1923 the sum of \$25,000.00, making the total of her benefactions to the university more than \$81,500.00. In September of 1913 Mrs. Swift paid the university \$5,000.00 on account of a promise of \$10,000.00, the balance to be paid at a later date. In October of 1913 Mrs. Swift promised the university \$6,000.00 which, with the \$10,000.00 already promised, would afford a fund sufficient to support a fellowship; and it was understood between her and the university that the fellowship, when set up, would be named in honor of her deceased husband and that the recipients of the fellowship were to be graduates of the defendant institute. Thereafter, she delivered to the university in January of 1914 \$6,000.00 and in July of 1914 \$5,000.00 (in the form of bonds), in accordance with her promise. The university had originally entered in its books the gift of \$5,000.00 of September, 1913, under the notation "General Endowment Fund"; this was stricken out and there was interlined the notation "The Gustavus F. Swift Fellowship". The January, 1914 and July, 1914 payments were entered each under a notation "Gustavus F. Swift Fellowship Fund". At some later date, at least by

May 1, 1920, the books of the university were made to
 187 reflect "Gustavus F. Swift Fellowship Fund" in the amount of \$16,431.25 and to show that the Fund was a memorial to her husband, the income of which was to go for annual fellowships for an alumnus of the defendant institute, and the specific then current investments were listed. The university's assets were pooled, however, and invested and re-invested as deemed most advantageous, and the income from the pool of assets was and is allocated to the various individual funds in proportion to their size. The gifts of Mrs. Swift used to support the Swift Fellow-

ship have been and are being handled by the university in this manner.

4. A large portion of Mrs. Swift's gifts to the university were made without restrictive provision by her as to their use, and she made no restrictive provision concerning the use by the university of the aforementioned gifts of \$5,000.00, \$6,000.00, and \$5,000.00, except as set forth in Finding 3 above.

5. The plaintiff university, in December, 1914, publicly announced and offered the Swift Fellowship, with announcement that the incumbent should be a graduate of Garrett Biblical Institute, the defendant herein; and plaintiff provided that the incumbent should be selected in the following manner: Garrett Biblical Institute, defendant herein, was to recommend one or more of its graduates annually and if one received the approval of the plaintiff university he was to become the Gustavus F. Swift Fellow for one year and receive one year's income from the aforementioned fund.

6. Commencing with the year 1915 and continuing through 1941, the university each year awarded a Gustavus F. Swift Fellowship. In each instance the recipient was a graduate of Garrett Biblical Institute, certified by the latter institution to the former and approved by plaintiff. The practice was to have Garrett Biblical Institute recommend two of its graduates and The American University select one of the two, but The American University might reject both and require Garrett Biblical Institute to submit additional names.

In making these awards the plaintiff university
 188 did not attach any restriction as to the institution or geographical location in which the recipient should pursue his studies; in each instance the university approved the location and institution proposed by the successful applicant and endorsed by the defendant institute; nothing was done by the university, however, negating the possibility of such restriction or other change in the terms and conditions of the offering and award.

7. The plaintiff university was first organized as a graduate school and officially opened (May 27, 1914) with only two buildings and a small group of professors. From this small beginning, the institution has grown (Complaint, pages 10 and 11) until now, including a modern college of Arts and Sciences, School of Nursing, Teaching Institute of Economics, and a number of Professional Institutes and other facilities for graduate and under-graduate students and adult leaders, it is equipped to be a place of study looking to the accomplishment of the highest learning.

8. On April 9, 1942, the Board of Trustees of the plaintiff university adopted a resolution (Complaint, page 12) concerning the Swift Fellowship that on and after that date the following would be conditions of the award thereof:

"1. The income from the endowment fund bearing the name of Anna M. Swift shall be made available annually for the support of a graduate fellowship for study in The American University.

"2. The fellowship shall be awarded by the University to a student nominated by the Faculty of Garrett Biblical Institute."

9. The defendant institute was notified of this action but declined to accede to the limitation; on the contrary, defendant in 1942 nominated candidates as before but insisted that the successful candidate might study under the said fellowship wherever he chose; plaintiff offered the successful candidate cooperation in arranging for his study in The American University, but he declined and made no further claim for the fellowship.

10. Thereafter defendant made no further nominations of its graduates to this fellowship, and (from the autumn of 1942 until the autumn of 1945) there ensued correspondence and discussions between officials of plaintiff (Complaint, pages 14 and 15) as to the right of plaintiff to change the terms of award of said fellowship; defendant insisted that plaintiff might not change the terms of award and notified plaintiff that it was going to file

a legal proceeding to compel a judicial construction of the rights of the respective parties with respect to the said fellowship.

11. From the inception of this controversy in the summer of 1942, plaintiff has continued to maintain the capital fund and has allowed to accumulate the income therefrom; and that accumulation during and since 1942 now exceeds \$3,000.00.

B. The Court concludes as a matter of law:

1. This action is properly brought under the Act of Congress approved June 14, 1934, commonly known as the Declaratory Judgment Act, 48 Stat. 955; an actual controversy exists between plaintiff and defendant.

2. The plaintiff corporation is empowered to establish and maintain within the District of Columbia a university for the promotion of education with such other powers as may be necessary fully to carry out and execute the general purposes of the corporation, as appearing in the acts of incorporation; its Board of Trustees is authorized, among other things, to make by-laws for the accomplishment of its purposes, for the management of its property, and for the regulation of its affairs; and this said Board of Trustees is constituted and empowered as the body by which the business of the said corporation shall be transacted.

3. Mrs. Swift's gifts to plaintiff of September 30, 1913, January 17, 1914, and July 6, 1914, in the sums of \$5,000.00, \$6,000.00, and \$5,000.00, respectively, which finance the Gustave F. Swift Fellowship, are unrestricted as to the use to which they may be put except that the income therefrom is to be paid annually to the successful candidate for the fellowship, who shall be a graduate of Garrett Biblical Institute.

4. Plaintiff, in the course of its administering of the said fellowship fund and awarding of the said fellowship,
190 has not in anywise circumscribed its freedom of exer-

cise of its judgment and discretion with respect thereto; nor has it in anywise limited its freedom to change the terms and conditions of the offering and award of the said fellowship.

5. No rights in the said funds used to finance the said fellowship, capital or income, have vested in others than the plaintiff university.

6. The said gifts of Mrs. Swift aggregating \$16,000.00 are, and since their receipt by plaintiff university have at all times been, a portion of plaintiff's invested capital funds.

7. In the absence of contrary limitation validly imposed by the donor of funds held by it or the vesting of rights therein in others, plaintiff has and at all times has had the right, power, and authority to control and direct and to vary from time to time, as it sees fit, the application and disposition of such funds and the income therefrom.

8. The aforementioned funds used to finance the Swift Fellowship are and at all times have been within the category referred to in conclusion of law numbered 7, above, subject only to the restrictions noted in Conclusion 3 above.

9. Plaintiff's action with respect to the said funds used to finance the Swift Fellowship, including particularly the action of its Board of Trustees of April 9, 1942, limiting the use of the Swift Fellowship to study in The American University, have been and are within its discretion and powers, and the authority of the Acts of its incorporation, and are valid.

10. Plaintiff's Board of Trustees had and has, subject only to the restrictions noted in Conclusion 3 above, full authority and power, as well, to do all other acts in its discretion deemed proper in the administration of the said funds used to finance the said Swift Fellowship; its actions, from the beginning, in the application and disposition of the said funds were entirely voluntary on its part; and its having voluntarily adhered for a period of years to

191 one plan with respect thereto in nowise circumscribed, restricted, or impaired its right, power, and authority to vary or change the same from time to time, in part or in whole, as it, in its discretion, might or may see fit.

F. DICKINSON LETTS
Judge

Aug. 22nd, 1949

Seen:

A. K. SHIPE

Attorney of record herein for defendant.

* * * * *

195 **Judgment.**

This cause coming on for trial on April 27 and 28, 1949, before the court without a jury, upon consideration of the pleadings and exhibits theretofore filed herein and of the testimony of witnesses presented on behalf of plaintiff and defendant and the various exhibits introduced in evidence on behalf of the plaintiff and the defendant and the written arguments of counsel for both parties, and the Court having taken the matter under advisement and having filed herein a written Memorandum Opinion, it is by the Court this 22nd day of Aug. 1949,

ADJUDGED that the principal of the fund immediately involved herein (being the result of donations to the plaintiff, The American University, by Mrs. Ann M. Swift, September 30, 1913, January 17, 1914, and July 6, 1914, in the sums of \$5,000.00, \$6,000.00 and \$5,000.00, respectively), and used to finance the Gustavus F. Swift Fellowship, are a part of the general invested capital funds of the said University and that the University at all times has had and continues to have full right, power, and authority to administer the said capital funds and the income therefrom, including those used to finance the said fellowship, with full right, power, and authority to determine and effect, and from time to time to vary or change, in part or in whole, the application and disposition of all of its said funds, capital and income,

196 as it, in its discretion, may see fit, within the limits of the special Acts of Congress approved February 24, 1893, and March 2, 1895, subject only to any restrictions validly imposed by a donor or bindingly undertaken by the University, or vested rights of others with respect thereto; and that the funds here immediately involved are not and never have been subject to any restrictions or any vested rights of others than the University with respect to administration, application, or disposition thereof, except that the income therefrom is to be paid annually to the successful candidate for the fellowship, who shall be a graduate of Garrett Biblical Institute; and that the action embodied in the resolution adopted by the Board of Trustees of The American University April 9, 1942, with regard to the funds herein immediately involved was and continues to be in all respects valid and does not infringe any right of the defendant, Garrett Biblical Institute.

F. DICKINSON LETTS

Judge

No objection as to form:

A. K. SHIPE

Attorney of record herein for defendant.

* * * * *

II.

EXCERPTS FROM TESTIMONY AND PROCEEDINGS.

3 Opening Statement on Behalf of the Plaintiff.

Mr. D. C. Colladay: May it please Your Honor, this is an action for a declaratory judgment which was filed by the American University some years ago against the Garrett Biblical Institute of Evanston, Illinois.

* * * * *

This fellowship is supported by the aggregate of three gifts of money totaling \$16,000 which was given in
4 1913 and 1914 by the late Mrs. Anne Swift, of Chi-

cago, to the American University. The fellowship has been granted by the American University consistently since 1915 to a graduate of the Garrett Biblical Institute of Chicago.

The practice has been for the Garrett Institute to nominate one or two of its graduating class as qualified for this fellowship for post-graduate study. It has also been the practice for the Garrett Institute to recommend an institution of learning where that post-graduate work should be done, and until 1942 the American University continued to acquiesce in that course of action.

The university, however, at all times from the founding of the fellowship reserved the right to pass upon the qualifications of the candidates and to pass upon the place where they should study.

The Court: In what manner did they reserve that privilege?

Mr. Colladay: That appears, Your Honor, in the early announcement of the fellowship to be granted by the university, and in other publications concerning it.

* * * * *

7 We propose to show to Your Honor that there is no evidence whatsoever to show that the funds which were given and which the university devoted to this fellowship were subjected to restrictions or that they were given to the university in trust. All of the evidence which it has been possible to amass through searching the university's records, fails to show anything in that direction.

* * * * *

8 We shall show Your Honor that in announcing and offering this fellowship in the name of Mrs. Swift's deceased husband, the university at no time committed itself to any detail as to how that particular fellowship was to be administered. They did from the beginning state in their announcements that only graduates of Garrett Institute would be eligible, but they consistently reserved the

right of passing upon the qualifications of the candidates and of passing upon the places and locations where they should study under that fellowship.

* * * * *

Opening Statement on Behalf of the Defendant.

Mr. Bastian:

* * * * *

9 This fellowship was specifically set up by Mrs. Swift as a memorial to her husband, with certain specific restrictions limiting it. Not, as Mr. Colladay says, as free gifts of the American University.

Mrs. Swift had given the American University three gifts which had no restrictions on them.

In this case, as we will show, the American University in seeking to get people to put their money into these fellowships stated that they could apply to graduates of a certain school, and that they could pursue their post-graduate studies at institutions of learning or seats of learning either in this country or abroad.

Now, from 1915 up to 1942 that course was followed.

* * * * *

12 Mr. Colladay: In reading the complaint and against it the answer, it appears very clearly that the real point of contention is what were the circumstances surrounding the giving of the funds by Mrs. Swift to the university and the establishment by the university of the fellowship, and the manner in which the fellowship has been administered.

* * * * *

13 Don Farquharson, was called as a witness for and on behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Colladay:

Q. State your full name, please. A. Don Farquharson.
F-a-r-q-u-h-a-r-s-o-n.

Q. What is your present occupation? A. Treasurer of
American University.

Q. How long have you held that position? A. Since May
1 of 1944.

* * * * *

Q. Have you, in connection with your work with
14 the university, had occasion to go into old records
of the university and familiarize yourself with them
more or less as to where they are and how to find them?
A. Yes, I have.

Q. I have here a paper which appears to be a list, and
which I will show to you.

(A paper writing was handed to the witness.)

I ask you what that list is.

A. It is a list of the contributions, the Swift contribu-
tions to the American University.

* * * * *

15 The Court: Very well. Let it be marked as Plain-
tiff's Exhibit 1 and it will be received in evidence.

(Paper writing entitled "Swift Contribution to the
American University" was marked as Plaintiff's Ex-
hibit No. 1 for identification and received in evidence.)

* * * * *

16 Mr. Colladay: If Your Honor please, the total of
this list is \$81,500. The first gift on the list is May
10, 1905, for \$10,000, followed by one on August 9, 1905 for
\$15,000. Then, running on through two other gifts, and
then coming to September 30, 1913, an item of \$5,000 which
is part of the fund suupporting this Swift fellowship.

Then on February 17, 1914, \$6,000 supporting the Swift fellowship. And on July 6, 1914, \$5,000 supporting the Swift fellowship. The total there being \$16,000.

* * * * *

Q. Mr. Farquharson, were you at sometime within the last six or eight months requested to make a further review of your search of records of the university connected with this fund? A. I was.

Q. In that connection did you prepare a memorandum showing what you found as to the source of the funds supporting the Swift fellowship? A. I did.

Q. I show you this paper and ask you if that is the
17 memorandum you prepared? A. Yes, that is the memorandum.

* * * * *

The Court: Very well. Then, the exhibit will be received, and the last paragraph will be withdrawn.

(Auditors' report on the Gustavus F. Swift Fellowship Fund, dated June 21, 1945, was marked as Plaintiff's Exhibit No. 2 for identification, and received in evidence.)

* * * * *

18 Q. Mr. Farquharson, will you please locate for the Court the original entries which are reflected by this memorandum which you have just testified you prepared, the entries showing the receipt by the university of these items, September 30, 1913, \$5,000; January 17, 1914, \$6,000; and July 6, 1914, \$5,000.

Would you step down and pick those out of the books, please?

(The witness stepped down to the trial table.)

A. On page 217 of the journal that was maintained by the American University under date of September 30, 1913, there appears this entry:

"It was entered as the general endowment fund."

Then there was later a line stricken through that, to read, "The Gustavus F. Swift Fellowship. Mrs. Annie M. Swift, Chicago, Illinois, (FMS) \$5,000."

Q. Do you know what the legend "FMS" in parentheses refers to? A. I think that refers to Mr. Stone.

Q. Who was he? A. A solicitor of funds for the university at that time.

Q. Did I understand you to say that that entry originally was made as an endowment fund entry? A. That is
19 right. It is marked "General Endowment Fund."

Q. And then that was stricken out and the reference to the Swift fellowship was entered? A. That is right.

Q. Will you find the second one of these items for us? A. On page 219, in the same journal, under date of January 17, 1914, there appears the following entries:

"Gustavus F. Swift Fellowship Fund. Mrs. Annie M. Swift, Chicago, Illinois, (FMS)."

The amount "\$6,000".

Q. Now, will you find the third one, please? A. The third entry appears on page 226 of the same journal, under date of July 6, 1914.

The entry, "Gustavus F. Swift Fellowship Fund, Mrs. Annie M. Swift, Chicago, Illinois. By bonds No. M5654, M5655, M5656, M5657, M5658, \$1,000 each. Swift & Company First Mortgage Sinking Fund Gold Bonds, at 5 per cent."

....

Within the parentheses "FMS".

The amount "\$5,000".

* * * * *

Q. Now, Mr. Farquharson, in your search of the records of the university referring to this matter, did you find any letters written by Mrs. Swift concerning it? A. I did.

Q. I hand you a letter dated May 12, 1914, purport-
20 ing to be signed by Mrs. Swift, and ask you if you

found that one in the records of the university. A. Yes, I did.

* * * * *

Mr. Colladay: I offer these three letters, if Your Honor please, as Plaintiff's Exhibits 3, 4 and 5.

* * * * *

21 The Court: They may be received.

(Letter, dated 5/12/14, Mrs. Annie M. Swift to American University, was marked as Plaintiff's Exhibit No. 3 for identification and received in evidence.)

(Letter, dated 5/12/14, Mrs. Annie M. Swift to American University, was marked as Plaintiff's Exhibit No. 4 for identification and received in evidence.)

(Letter, dated 7/3/14, Mrs. Ann M. Swift to Mr. Franklin Hamilton, was marked as Plaintiff's Exhibit No. 5 for identification and received in evidence.)

* * * * *

22 Q. Mr. Farquharson, in your investigation of this matter in the records, did you find a record of the reporting of this fellowship fund to the trustees? A. I did.

* * * * *

23 Q. Will you tell us, Mr. Farquharson, what that report was to which you have just been referring?
A. It is a report of the chancellor to the trustees of the American University, dated December 17, 1913.

Q. Will you turn to page 9 of that report, please?

The Court: Is the book called a report?

Mr. Colladay: Your Honor, it is a regular minute book and this happens to be one of the reports which is in it. This is a report of the chancellor on December 17, 1913.

The Court: You find it in a minute book. What minute book is it?

The Witness: It is the minute book of the Board of Trustees of the American University. It is for the period May 28, 1891 to June 7, 1922.

The Court: Very well.

By Mr. Colladay:

Q. Will you read to the Court from page 9 the paragraph there relating to a new fellowship? A. "In the concrete increase of our resources there has been added a new fellowship of \$16,000; the gift of Mrs. G. F. Swift of Chicago. \$5,000 of this has been paid. In January \$6,000 more will be paid. The following \$5,000 will be paid within the year sometime."

Q. Now, Mr. Farquharson, you have previously located for us the original entries showing the receipt of these three items. In your search, did you find a point in the books where the items were consolidated into a single fund? A. I did.

Q. Will you locate that for us, please?

Mr. Colladay: If Your Honor please, I have just asked Mr. Farquharson if he located the place in the university books where these three separate gifts were brought together and carried as a single fund.

The Court: Very well.

By Mr. Colladay:

Q. And what is your answer, Mr. Farquharson? A. On page 3 of the journal, for the period May 1, 1920 to November 30, inclusive, under the date of May 1 the fund itself was set up. It was captioned, "Gustavus Swift Fellowship Fund", and the amount, \$16,431.25".

Q. Do you find another entry related to that, Mr. Farquharson? A. Yes.

Mr. Bastian: If the Court please, I move the answer be stricken out as not responsive to the question.

The question was whether this was the first time they were consolidated. I do not know that the answer is re-

sponsive to the question whether they were consolidated in this for the first time or not.

The fact they show as of May 1, 1920, does not mean they were not consolidated before.

Mr. Colladay: If Your Honor please, I asked the witness whether he found a point in the books of the university where these three gifts were brought together and carried as a single fund, and his answer was yes.

Then I asked him to give us the entry.

Mr. Bastian: That is the very point. The question is whether they were brought together, which indicates it was the first time they were brought together. There is no assurance this is the first time. As a matter of fact, we know that it was not the first time they were brought together.

Mr. Colladay: If you would like to cross-examine him, Mr. Bastian, that is your privilege.

Mr. Bastian: I made a motion to strike out the answer as not responsive, Your Honor.

The Court: The motion is overruled.

By Mr. Colladay:

26 Q. My last question to you, Mr. Farquharson, was whether you found also a related entry to the one which you have just read. A. I did.

Q. Will you locate that for us and read it, please? A. On page 9 of the same journal, the assets of the funds were listed. The entry is as follows:

“Gustavus Swift Fellowship Fund. This fund is a gift from Mrs. Annie M. Swift of Chicago, Illinois, as a memorial of her husband, the income of which goes for annual fellowships for an alumnus of the Garrett Biblical Institute.

• • • • •

27 Q. Now, Mr. Farquharson, I will hand you what purports to be a copy of the audit of the university

April 30, 1920, and ask you whether you are familiar with that document. A. I am.

* * * * *

Q. Do you find in that audit a reflection of this fellowship fund that we are discussing? A. There is an entry on it.

* * * * *

Q. Will you please state to the Court under what identity that is listed, and how it is listed? A. "The American University report on audit, April 30, 1920."

Under Schedule 5:

28 "American University. Accountability, endowment and building funds, April 30, 1920.

"Gustavus Swift Fellowship Fund, \$16,431.25."

* * * * *

29 Q. I will ask you this, Mr. Farquharson—What is the practice in the university in the handling of funds for investment purposes? A. For investment purposes the funds are pooled. That is, the assets are pooled and investments made.

Q. And then how are the earnings and investments handled? A. The earnings are distributed then to the various funds whose assets have been pooled in relation of the amount of the fund to the whole fund.

* * * * *

30 Q. I call your attention, Mr. Farquharson, to the letters of administration printed at the end of the will, and ask you if you find in the first few lines there a recital of the date of Mrs. Swift's death. A. I find
31 it there.

Q. Would you please read that to the Court? A. "Know ye that whereas, Ann M. Swift, late of the County of Cook and State of Illinois, died on or about the 19th day of May, A. D., 1922."

Q. Now, Mr. Farquharson, in your examination of the records relating to this fellowship, did you find letters other

than those we have already referred to, signed by Mrs. Swift? A. I did.

Q. Did you find letters concerning the gift signed by a Dr. Stone? A. I did.

Q. Is that the same Dr. Stone that you have already testified was a solicitor for the university? A. That is right.

Q. I hand you a letter purporting to be signed by Dr. Stone, dated October 7, 1913, and ask you if you got that from the records of the university. A. I did.

Q. And I will hand you a similar letter dated October 8, 1913, and ask you if that also came from the records of the university. A. It did.

Q. And a third letter dated October 9, 1913, similarly signed, and ask you if that is in the same class. A. It is.

Mr. Colladay: If Your Honor please, I will offer these letters in evidence as Plaintiff's Exhibits.

* * * * *

The Court: They will be received.

(Letter, dated 10/7/13, Stone to Hamilton, was marked as Plaintiff's Exhibit No. 6 for identification and received in evidence.)

(Letter, dated 10/8/13, Stone to Hamilton, was marked as Plaintiff's Exhibit No. 7 for identification and received in evidence.)

(Letter, dated 10/9/13, Stone to Hamilton, was marked as Plaintiff's Exhibit No. 8 for identification and received in evidence.)

* * * * *

37 Q. Now, Mr. Farquharson, I hand you a three-page document purporting to be signed by Fred M. Stone, directed to the Board of Trustees of the American University, and dated on the reverse side "December 17, 1919", and ask you if you are familiar with that paper? A. Yes.

Q. Is that one of the papers that you found in the university records? A. It was.

Q. Does it relate in some way to this Swift fellowship? A. Yes.

Mr. Colladay: May it please the Court, I would like to offer this in evidence with the privilege of substituting a photostat, as Plaintiff's Exhibit No. 9.

* * * * *

The Court: It may be received.

(Letter, dated 12/17/13, Fred M. Stone to Board of Trustees, was marked as Plaintiff's Exhibit No. 9, for identification, and received in evidence.)

* * * * *

38 Q. Mr. Farquharson, I hand you a printed pamphlet entitled "American University Courier, Volume 21, No. 3, December, 1914."

I ask you if you are acquainted with that volume. A. I am.

* * * * *

42 (A typewritten copy of the paragraph on Fellowships, contained in Volume 21, No. 3 of the American University Courier, December, 1914, will be supplied and marked as Plaintiff's Exhibit No. 10 for identification and received in evidence.)

* * * * *

45 Q. Mr. Farquharson, in your examination of correspondence relating to this matter, did you find any letters which had to do with the terms of award of this fellowship? A. I did.

* * * * *

47 Q. Mr. Colladay: Now, if Your Honor please, I should like to offer in evidence, with the privilege of substituting photostatic copies, as Plaintiff's Exhibit 11, the letter of President Stuart, dated February 17, 1915,

and the two carbon copies of letters directed to President Stuart dated February 24, 1915, and February 26, 1915.

Similarly, as Plaintiff's Exhibit 12, with the privilege of substituting a photostat, I would offer the letter of Dr. Stuart to Bishop Hamilton, dated June 8, 1917.

And as Plaintiff's Exhibit 13, I would offer, with the privilege of substituting a photostat, the longhand letter signed purportedly by John W. Hamilton, dated July 2, 1918.

And as Plaintiff's Exhibit No. 14, with the privilege of substituting a photostat, I would offer the letter of Dr. Stuart to Bishop Hamilton, dated July 11, 1918.

The Court: Mr. Bastian?

Mr. Bastian: No objection, Your Honor?

The Court: The exhibits may be so marked and
48 received.

(Letter, dated 2/17/15, Stuart to Hamilton, was marked as Plaintiff's Exhibit No. 11 for identification and received in evidence.)

(Letter, dated 6/8/17, Stuart to Hamilton, was marked as Plaintiff's Exhibit No. 12 for identification and received in evidence.)

(Letter, dated 7/2/18, Hamilton to Stuart, was marked as Plaintiff's Exhibit No. 13 for identification and received in evidence.)

(Letter, dated 7/11/18, Stuart to Hamilton, was marked as Plaintiff's Exhibit No. 14 for identification and received in evidence.)

* * * * *
49 Mr. Colladay: Now, if Your Honor please, I should like to offer as Plaintiff's Exhibits, with the privilege of substituting photostatic copies, the following letters:

Plaintiff's Exhibit No. 15 to be the letter to Dr. Osborn, dated August 14, 1922, signed by Edwin E. Voigt.

No. 16 to be the carbon copy of October 18, 1929, letter to Chancellor Clark of the university.

No. 17 to be the stenographic copy of June 5, 1937, letter from Garrett Biblical Institute to Dr. Ernest F. Griffith of the American University.

And No. 18 to be the letter of President Eiselen of
50 Garrett Biblical Institute, to Chancellor Lucius C. Clark of the American University, and dated October 13, 1925.

The Court: Do I hear any objection to the offers?

Mr. Bastian: If the Court please, I think they are totally immaterial, but it will probably save time by letting them be read and we have no objection to them.

The Court: The exhibits may be received, and photostats may be substituted.

(Letter, dated 8/14/22, Voigt to Osborn, was marked as Plaintiff's Exhibit No. 15 for identification and received in evidence.)

(Letter, dated 10/18/29, Treasurer of American U. to Chancellor Clark, was marked as Plaintiff's Exhibit No. 16 for identification and received in evidence.)

(Letter, dated 6/5/37, President of Garrett Biblical Institute to Dr. Griffith, was marked as Plaintiff's Exhibit No. 17 for identification and received in evidence.)

(Letter, dated 10/13/25, Eiselen to Chancellor Clark, was marked as Plaintiff's Exhibit No. 18 for identification and received in evidence.)

* * * * *
52 Now, in Exhibit 13, which is the longhand letter of John W. Hamilton to President Stuart, dated July 2, 1918, we have this:

* * * * *

53 The Court: What is the date of that letter?

Mr. Colladay: That is July 2, 1918.

Mr. Bastian: As a matter of fact, it was July 6th.

54 Mr. Colladay: Is it a 6th?

Mr. Bastian: Yes. I have the original.

Mr. Colladay: I am willing to stipulate it is the 6th.

Mr. Bastian: It does not make any difference.

Mr. Colladay: I am willing to agree on the record, Your Honor, that the date of the letter should be July 6 instead of July 2, 1918.

The Court: Very well.

* * * * *

57 Q. I show you a letter purportedly signed by Mrs. Swift, directed to Dr. Hamilton, and dated November 16, 1907, and ask you if you can identify that as coming from the records of the university. A. Yes, I do.

Q. I show you another letter signed purportedly by Mrs. Swift, directed to Dr. Hamilton, and dated November 16, 1907, and ask you if you can identify that as coming from the records of the university. A. Yes, I do.

Mr. Bastian: May I ask that Mr. Colladay state for the record the purpose of this?

Mr. Colladay: The purpose of offering those letters, Your Honor, as exhibits, is to show the intense interest which Mrs. Swift had in the affairs of the university, even before the university opened as an operating institution.

Mr. Bastian: If the Court please, I do not think it is material but I do not believe I shall object.

The Court: Very well. Let them be marked.

Mr. Colladay: I offer the letter dated November 5, 1907, as Plaintiff's Exhibit No. 19, and the letter dated November 16, 1907, as Plaintiff's Exhibit No. 20.

(Letter dated 11/5/1907, Swift to Hamilton, was marked as Plaintiff's Exhibit No. 19 for identification and received in evidence.)

(Letter, dated 11/16/1907, Swift to Hamilton, was marked as Plaintiff's Exhibit No. 20 for identification and received in evidence.)

* * * * *

Cross-Examination

By Mr. Bastian:

Q. Mr. Farquharson, you recall that the Court permitted an examination of the records of the university in connection with this case? A. Yes.

Q. This correspondence that you have introduced yesterday from the letter of Dr. Stuart to Hamilton, those were not exhibited, were they? A. I am not too sure.

Q. When did you find those letters? A. Well, I have been working from time to time in going through what we call the archives file, to gather any particular material.

Q. Starting when, Mr. Farquharson? A. Oh, six months ago, probably

Q. Do you recall whether you showed us these letters or not? A. I am not too sure of those.

61 Q. Some of them have developed in the last several weeks, have they? A. Yes.

Q. Mr. Farquharson, I ask you to look at the book that started in 1920, if you please.

Would you mind opening that to the place that you had it open to yesterday?

(The witness stepped down to the trial table and opened the book.)

Was this book a transfer from another book?

A. In May 1, 1920, the financial records of the university were changed to a double entry set of books, and on May 1, 1920, they had gathered all the material and had recited it in this particular journal entry.

Q. Therefore, your answer would be that this is a transfer from other records? A. Surely.

Q. These are obviously written at the same time, were they not? A. That is right, yes.

Q. Will you show me the May 1, 1920, entry that you showed us yesterday afternoon?

(The witness exhibited a portion of the book to Mr. Bastian and resumed the witness chair.)

Mr. Farquharson, when was this inserted item,
62 dated November 1, 1921, put in there? A. I don't
know of this.

Q. That is a part of the records of this book, contained
in this book? A. The record that I was reading yesterday
was the one that was written in longhand.

Q. Well, you don't know when this thing was pasted in
here, which is dated November 1, 1921? A. No. It was
there when I first found the books.

Q. And when was that, Mr. Farquharson? A. In '44.

Q. Is that the first time you ever went over these records?
When did you come with the university? A. In May of
'44.

Q. I see.

Mr. Bastian: Mr. Colladay, I would like to introduce
in evidence this insertion in this portion of the book (in-
dicating).

Mr. Colladay: I don't see that it is material, but if you
want to introduce it, it is all right.

Mr. Bastian: If the Court please, this is a part of the
record that was introduced yesterday:

63 "Gustavus Swift Fellowship Fund. This fund is a
gift from Mrs. Annie M. Swift of Chicago, Il-
linois, as a memorial to her husband, the income
of which goes for annual fellowships for an
alumnus of the Garrett Biblical Institute. At the
present time the fund is invested as under:"

And there follows the then makeup of the fund.

This is the inserted part:

"All payments for fellowships are hereafter to be
applied directly against the income received from the
fund providing for the fellowship, no transfers to be
made to the current fund except to take care of the cost
of handling which is to be 10 per cent of the amount of
income collected during the period?"

By Mr. Bastian:

Q. I take it, Mr. Farquharson, that that course was continued. That you took 10 per cent of the income of the fund and transferred that to the general assets of the university?

A. They have been doing it, I know, since 1944 when I came to the university.

Q. They were doing it at that time? A. I don't know whether they were doing it prior to that time, but from that time on they have done it.

Q. This would indicate that it was done since 1921, would it not? A. It would indicate that.

64 Q. Mr. Farquharson, up to what time was this fund? A. I cannot answer that. I don't know.

Q. Do you recall going over the books with Mr. Colladay, Mr. Shipe, and myself? A. I do.

Q. Do you recall it was said that these were invested as a separate fund until 1933? A. That is the approximate time at which the investment of the funds were pooled.

Q. And up to the time they were pooled they were carried as separate investments? A. Separate investments.

Q. Such as they were here, certain bonds which would aggregate approximately \$16,000? A. That is right.

Q. From approximately 1933 on they were pooled with all the other assets of the university and they were allocated, the proportionate share that the Swift fellowship bore to the total amount of the funds of the university. Is that correct? A. Yes, that is correct.

Q. What was done with the income allocated to the \$16,000? A. You mean from 1944?

65 Q. No, what do the books show from the time the fund was received?

A. Oh, yes. There would be an income account to the fund.

Q. Specifically allocated to this \$16,000 fund? A. Yes.

Q. And that still takes place. Is that correct? A. That is right.

Q. So that the income, although it may be in the pool, the proportionate \$16,000, we will say bears to a million dollars, would be allocated to the income for this fund?

A. That is correct.

Q. Now, up until 1942, what charges were there against this income? A. Up to 1942 I presume there would be the charges for scholarships or fellowships.

Q. And any overage, what would happen to that? Where would that go? A. Be retained in the income fund?

Q. Of the Swift fellowship? A. Right.

Q. So that as against the Swift fellowship fund income, there would be allocated the 10 per cent for handling of the university, the charge for the fellowship, and the balance would be as a reserve or to be used in subsequent years?

A. I cannot answer what the actual practice was at
66 that time.

Q. What I am getting at is if all through these years this fund was kept separate and distinct and the only things charged against it being the university charge for handling and the cost of the fellowships. A. I would assume that the fund is a restricted fund. Therefore, the income would need to be held in a restricted manner.

Q. What do you mean by restricted fund in restricted manner? A. The purpose of the gift was restricting it to a fellowship. Then it could not be used for the actual operation of paying salaries, and paying for coal, and improving the university. And, being held in a restricted fund, only those payments could be made against it in which the restriction would apply, and in these two instances there would be the cost of the fellowship plus the cost of handling the fund.

Q. And the balance was still retained in this restricted fund? A. That is right.

* * * * *

69 Q. I show you, Mr. Farquharson, two small memoranda and ask you if they came from the records of the university. A. Yes, they did.

Mr. Bastian: I will ask that they be marked as Defendant's Exhibits 2 and 3 for identification.

(Small memorandum on paper, headed "Gustavus F. Swift Fellowship Fund, was marked as Defendant's Exhibit No. 2 for identification.)

(Small memorandum on card headed "Swift, Gustavus F." was marked as Defendant's Exhibit No. 3 for identification.)

* * * * *

70 Q. Were there applications filed by these students, were they found among your papers? A. No, I did not find the applications.

Q. You found no applications for scholarships? A. No.

Q. Do you know what was done with those when they were received by the university? A. I don't know.

* * * * *

71 *Redirect Examination.*

* * * * *

By Mr. Colladay:

Q. You were asked by Mr. Bastian a number of questions about accounting practices and procedures prior to your coming to the university in 1944.

In your answers to those questions, were you answering things that you know as a fact? Or were you speculating?

* * * * *

72 The Witness: Part of my answer was knowing the way that the fund should be operated, that is, the way we would operate it at the present time, and I remember seeing entries that were placed—both income and expense being charged to the fund, that is, to the income fund—so I naturally assumed that, just as we would do it today, we would charge the income with the fellowship and we would credit the income account with the earnings of the fund.

By Mr. Colladay:

Q. I think at another point Mr. Bastian asked you a question about the handling of funds, and I did not quite understand your answer. I did not gather whether you said that if this fund we are concerned with was given for this fellowship, certain things would follow; or, whether you stated that this fund was given for this fellowship and certain things would follow.

Can you clarify that? A. I was speaking of the charges against the fund, and that if the fund carried a restriction, then the income would be segregated from the income of the university.

* * * * *

Recross-Examination.

By Mr. Bastian:

Q. Just one question, Mr. Farquharson: You based your answers to me from your examination of the books of the university, did you not? A. I did not understand you.

Q. What I mean is this: You are the chief financial officer of the university, are you not? A. That is right.

Q. And you are familiar with the books of the association, both since you became treasurer and before? A. That is right.

Q. In other words, to do your duties properly you would have to know what has gone on before or at least what the record shows has gone on before. Is that not correct?

A. That is right.

Q. And your statements to me as to how that income was allocated and extended is based upon your examination of the association. Is that not correct?

A. Not all of the entries to the fund. As I said before, I remember seeing the income being credited to build up the income account. I saw several instances in which charges were made for fellowships which would decrease the amount of the fund.

Q. Now, you saw those records which were made before you came there, as well as after you came there. Is that not correct? A. I have not seen any charges made against the fund for fellowships since we have been there.

Q. No, we realize that, Mr. Farquharson.

Has that 10 per cent charge been made? A. Yes, sir.

* * * * *

Paul F. Douglass, was called as a witness for and on behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

75 By Mr. Colloday:

Q. Dr. Douglass, will you state your full name, please? A. Paul F. Douglass.

Q. What is your present position? A. I am president of the American University.

Q. How long have you been president? A. I became president on a contract, on May 1, 1941, and came on April 1, 1941, to assist with the reorganization of the university.

* * * * *

76 Q. Dr. Douglass, have you made some searcher investigation of the records of the university in connection with this matter of the Swift fellowship? A. I have, and in all endowment funds relating to the university. Personal search and review of the records.

Q. There has been some reference here to the plan which was announced by the university in connection with the granting of fellowships in 1914.

Did you find any record as to that plan in the records of the university? A. Yes, sir.

* * * * *

Q. I hand you a book which, on its first page is entitled "Proceedings of the Board of Trustees of the American University, Charles W. Baldwin, Secretary, May 28, 1891, to June 7, 1922".

I ask you to turn to page 195 and tell us whether you find anything there with reference to this plan for scholarships? A. Yes.

* * * * *

Q. Will you go ahead, Dr. Douglass, and tell us what you found there with reference to the matter of offering fellowships? A. On page 197, Section 5, there is a paragraph which deals with fellowships. This is one of the seven parts of what I would call the working plan of the university.

This says:

“Fellowships—in order that better to utilize the financial resources of the university for academic work, there shall be applied to the university fund the policy of distributed efficiency. This policy shall be put into operation through the medium of university fellowships. So far as practicable, such fellowships should be established and supported from university funds. To students who are granted fellowships, there will be opened at once the highest academic opportunities. For a fellowship will enable a student to pursue work at the institution and in the environment which for his purpose shall offer the largest possible advantages.

* * * * *

80 The Court: Now, who said that?

The Witness: This is the report adopted by the Board of Trustees of the American University on December 11, 1912, upon the recommendation of a committee of the Board of Trustees which was set up; the committee being W. S. Pilling, J. C. Nicholson, and W. R. Wedder- spoon—no, that is not the committee. Excuse me.

This report was reported by Chancellor Hamilton, who was then chancellor of the university.

By Mr. Colladay:

Q. Do you recall, Dr. Douglass, whether there was a prior request or authorization from the Board of Trustees that a report be formulated and submitted? A. Yes, sir, there was.

Q. Are you able to locate that? A. Yes, I am able to locate this.

On page 194 there is an action of the Board of Trustees which is entitled "Opening of the American University," and this is the paragraph:

"The Chancellor moved that a committee of five be appointed by the Board to consider and report to the next meeting of the Board a tentative plan for opening the University and the inauguration of academic work. On motion of B. F. Leighton, the motion was amended so that the Chancellor should be Chairman and select
81 his committeemen."

Mr. Bastian: What is the date of that, Doctor?

The Witness: The date of this is June 6, 1912.

Mr. Bastain: Thank you.

By Mr. Colladay:

Q. Dr. Douglass, from your examination of records of the university during your tenure of office, are you able to outline briefly the development of the university? A. Yes, sir.

Q. Will you do that briefly, please, from the beginning with the tentative plan? A. May I make a statement from the beginning?

Q. Maybe you would like to go back of the tentative plan. A. That is right.

Judge, the American University was an idea existing in the ideous stage from 1893, when it was chartered by Congress, until 1914 when academic work was inaugurated.

During this period from 1893 until 1914 the university was engaged in promotion, fund-raising, trying to obtain support from the Methodist Church to proceed with its work.

The funds which were expected to come from the church never came, and the record shows that in 1912 the Board of Trustees decided to proceed to the operation of an academic program. They held 90 acres of land with two buildings, one building completed and one in process of completion, at Massachusetts and Nebraska Avenues, and the records show that the board in deliberation decided to open academic work in terms of this tentative working plan.

* * * * *

82 The Witness: On page 194—the point that I was talking about came to culmination. They had to open the university because they had a charter, they had land, they had buildings, they had made offerings of an
83 educational program to the public, and on page 194 it relates to the drafting of a tentative plan for opening the university.

The Court: Under what date, please?

The Witness: This was on the basis of a trustee action on June 6, 1912.

The Court: Very well.

The Witness: This action, this working plan, was reported to the board—this tentative plan reported to the board—on December 11, 1912, and adopted by the Board of Trustees, and became operative in 1914 with an inauguration address delivered by President Woodrow Wilson of the United States.

Now, the university had inadequate funds, it had no faculty, it had no organized curricular offerings, and so this provision of fellowships, in this tentative plan, was the way that the university operated from 1914 until 1919, in terms of a further action which I will presently read.

During this period the university asked various other institutions throughout the United States—the university being wholly a graduate institution—to recommend their graduates to a Board of Award which was not a faculty, which was a group of unpaid scholars who existed in Wash-

ington who screened these candidates and then recommended the candidates nominated to the Board of Trustees. And these candidates were then approved and their working plan of scholarship approved by the Board of
84 Trustees.

* * * * *

86 Now, in 1919 the university faced another problem, and this Board of Award made a report, dated June 4, 1919, on page 257.

This is the joint committee of the Executive Committee and the Board of Award which made the following report:

“To the Board of Trustees: June 4, 1919.

“In the belief that the American University is conducting its educational affairs on too small a scale to enable it to have a safe position in the educational world as a graduate university granting advanced degrees, the Washington members of the Board of Award presented to the Chancellor and the Executive Committee of the Board of Trustees at a recent meeting, an outline plan for the larger educational program to be
87 put into immediate operation. The plan received general approval and a committee was appointed to draw up the plan in more detail and present it to the Board of Trustees.

“The work of the committee has been done according to the instructions and the following motion:”—which related to raising funds for the university to support this particular program.

“In general, this plan is based on the proposition that the Board of Trustees shall annually adopt a definite program for the educational work of the university during the ensuing year, and a budget for the expenses involved in carrying out this plan, and when the plan and budget have been approved by the Board, the funds necessary to carry out the plan will be provided by the Board of Trustees.

* * * * *

88 The Board of Award was then changed in 1923
 into an Academic Council, because the university
 had engaged full-time Deans and the fellowship pro-
 89 gram was substantially discontinued.

 And this Academic Council continued in operation
 until 1929 when the Graduate Council was established, which
 continues at the present time.

* * * * * * * * *

89 Q. Dr. Douglass, you have stated what facilities
 the university had and what facilities it offered to
 graduate students in the early years.

 Would you mind briefly stating, by comparison, the serv-
 ices and facilities offered to students now, both graduate
 and undergraduate? A. At the present time the American
 University is composed of a College of Arts and Sciences
 adequately housed on a campus at Massachusetts and Ne-
 braska Avenues, on properties on F Street between 19th
 and 20th, with both a graduate and undergraduate
 90 program.

 A School of Law, the Washington College of Law;
 a division of professional institutes serving approximately
 4,500 students a year, day and evening.

 Will graduate this year about 300 students, in graduate
 and undergraduate studies, with an outstanding and im-
 portant leadership in the academic deanships of its faculties.

 Q. Dr. Douglass, in your experience as president of the
 university, or in your search of records of the university,
 have you found any instances of graduate students taking
 their graduate courses at the American University who
 were already holders of theological degrees? A. Yes, sir.

 Mr. Bastian: If the Court please, I object. It is not
 material at all whether he found anybody taking—

 Mr. Colladay (Interposing): One of the assertions of
 the defendant in this case, as I understand it from the
 pleadings, Your Honor, is that the American University has
 nothing to offer as a graduate course to a holder of a theo-
 logical degree, and it is for that reason that I have asked

Dr. Douglass this question as to whether they do have or have had students in graduate courses who were holders of theological degrees.

Mr. Bastian: In courses, you say?

Mr. Colladay: Yes.

Mr. Bastian: All right.

91 The Court: Objection overruled.

You may answer.

The Witness: The answer is yes. We have had and do have at the present time.

* * * * *

From your knowledge of the records of the university, can you tell us who Presidents Hurst and McCabe were, to whom she refers?

* * * * *

92 There were the first two Chancellors of the University; McCabe succeeding Hurst.

* * * * *

Q. State your full name for the record. A. Pitman B. Potter.

Q. What is your present office? A. Dean of the Graduate Division of the School of Social Sciences and Public Affairs, American University.

* * * * *

93 Q. Dean Potter, would you summarize briefly for the Court the courses and degrees which are offered by the graduate school of the American University? A. The School of Social Sciences and Public Affairs, as a whole, offers work in several different departments; economics; history; communication—which includes journalism, radio and so on—sociology; public welfare; political science; public administration, and international relations and organization.

Q. Would you state, please, what degrees are offered by the graduate school? A. Doctor's and Master's degrees in these various departments.

Q. Dean, from your experience in graduate education both here and abroad to which you have referred, would you give the Court the benefit of your opinion as to the quality of the graduate school of the American University? A. I have no doubt as far as my personal judgment is concerned, that the graduate work done at the American University is on a par with that of the leading 10 or 15 graduate schools in the United States. You cannot compare it very well with European institutions
94 because work is slightly different in form.

Q. Dean, in your experience with the graduate school of the American University, or from your knowledge of records of the graduate school, are there now or have there been students in the graduate school taking graduate work who are holders of theological degrees? A. There have been and there are. This morning we administered an examination to one such candidate for the Doctor's degree.

* * * * *

95 *Cross-Examination.*

By Mr. Bastian:

Q. Do you have a theology school at American University?

A. A school of theology, sir?

Q. Yes. A. No.

Q. Is your university's reputation based upon schools other than theological? A. I did not catch that.

Q. I say, the fine reputation which I will admit your school has is not based, then, upon the fact that it has among other things a school of theology? A. Not in the strict sense of the term "theology".

Q. Do you give a degree of Bachelor of Divinity? A. No.

Q. Other colleges and universities in the country do, do they not, Doctor? A. Yes.

Q. And some of them are known particularly for that branch of their graduate school. Is that not correct? A. That is true.

Q. These ministers and theologians who have come to your school, do they come to get a higher degree in theology? A. No. They come to get higher degrees in
96 social sciences because of the development which has taken place in recent years in the position of the church with respect to society and social problems.

Q. In other words, they go to you particularly because they want to have a Doctorate or a Master's degree in social science? A. That is true.

* * * * *

Evidence on Behalf of the Defendant.

* * * * *

Horace G. Smith, was called as a witness for and on behalf of the defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Bastian:

Q. Doctor, will you give the Court your full name? A. Horace G. Smith.

Q. Dr. Smith, what is your occupation? A. I am a Methodist Minister detained by the Church as presi-
97 dent of one of its ten graduate schools of theology.

Q. What school is that? A. Garrett Biblical Institute.

* * * * *

Q. Doctor, will you tell us what the Garrett Biblical Institute is, how it was organized, and how it functions? A. Your Honor, Garrett was organized by substantially the same group of Methodist people that organized Northwestern University.

We were founded to train men for the Methodist ministry, but we now have men from many other denominations as well as from the Methodist Church.

We are located on the campus of Northwestern University. Our buildings are on University ground. We

have our own Board of Trustees, our own faculty, and our own endowment. We are not really officially a part
 98 of the university, but we serve as its divinity school. It has no other divinity school.

There is full and complete interchange of classes and their credits. Northwestern students come over to our classes without payment of tuition, and the students that we recommend are allowed to take work at the university without payment of tuition.

Q. Doctor, may I ask you when you graduated from the Garrett Biblical Institute? A. 1910.

Q. And has your association with it been close since that time? A. I have been located within 10 or 15 miles of the school ever since then.

Q. How many of its annual commencements have you attended since you graduated? A. All of them.

Q. That is all since 1910? A. Yes.

Q. I will ask you, Doctor, what students are taken by the Garrett Biblical Institute. In other words, what degrees, if any, must they have before they come to your school? A. Men who are admitted now must have a Bachelor's degree from a recognized college.

Q. And what degrees do you give? A. At the
 99 end of three years of graduate study, we give them a Bachelor of Divinity degree.

* * * * *
 Q. Doctor, did you know of Mrs. Gustavus F. Swift? A. I knew of her and I suppose I have seen her, but I did not know her.

Q. Do you know of the fellowship which the Garrett Biblical Institute had as a result of her generosity? A. Yes. I remember when it was announced and I met Dr. Stone later after his retirement, who secured the gift.

Q. Who was Dr. Stone, by the way? A. He was a graduate of Garrett Biblical Institute.

Q. And what was his work in his later life? A. At the time I knew him he was soliciting funds for the American University.

Q. Doctor, when did you become president? A. '32.

Q. Since the establishment of the fellowship, could
100 you tell me how often, and covering what years, this
Gustavus F. Swift Fellowship was granted? A.
Well, it was granted every year, as I recall it, until 1942.

Q. Starting when? A. Well, my administration in '32,
but it had been given before that. I think the first one was
in '15.

Q. How did you know it was given before that? A. Be-
cause I have had the convocations and heard it announced
year by year, and most of the recipients were personally
known to me.

Q. How were those announcements made at the convoca-
tions? A. Well, they were made as one of the signal events
of the convocation period. It was regarded as one of the
greatest honors that could be announced at the convoca-
tion.

* * * * *

Q. I don't mean to go into details, but how did you select
him? A. You mean now?

Q. Yes. A. Well—

Q. I don't mean now. I mean before 1941. A. At
101 the end of a school year, along about this season,
the registrar will compute the academic standing of
all members of the graduate class. Those who have ap-
proximately an A minus or an A average will be put on a
preferred list and given to the president. He will then
call in all the advisers of those who are on that list and that
group of advisers become a panel for the selection of those
who are to be nominated to the American University.

Q. Is scholastic standing the only condition of their nom-
ination? A. No, sir. It might well happen that the third
man on the list would be given the fellowship, because of
a more forceful personality or larger promise of useful-
ness.

Q. Usually, how many were selected? A. Usually two.

They were sent to the proper officer of the American University at our alumnus for the year.

Q. Who made the selections as between the two submitted? A. The American University.

Q. And could you tell me from your experience extending from the time of your graduation the schools which were selected by these candidates? A. It is a rather limited list of schools. I do not have the list compiled, but out of my knowledge they have gone to these places:

They have gone to Harvard, they have gone to
102 Yale, they have gone to Union or Columbia.

Q. Tell us what you mean by "Union". A. The Union Theological School of New York. It has substantially the same relationship to Columbia that Garrett has to Northwestern.

Q. Have there been any students who went to foreign universities? A. Yes. At least one has gone to Edinburgh, and one to the University of Berlin.

Q. Do you recall any other universities which were selected than those you have enumerated? A. I do not.

Q. Have any of them been nominated to go to American University? A. No.

Q. Would you tell us why? A. Well, could I make a statement first?

Q. Yes. A. Garrett does not designate where these men are to go.

Q. Who designates that? A. The man himself comes in and says, "If I am given a fellowship, I would like to study at this university and for this degree."

And unless there is some unforeseen reason, Gar-
103 rett would accede to his request.

Now, to go on to your question why they have not been sent to the American University, I would have to go back a little.

Your Honor, all of our students have spent four years in college. They have come to us for three years of graduate study in theology. It is only a very limited number of them

that have the financial means to go on for additional periods of study.

Those who do go on have a very definite objective in mind of earning a Doctor's degree in a field that will qualify them to each preferably in a seminary like ours, or work of similar kind.

They would not, for instance, consider ordinarily going to any one of the many high-grade graduate schools established by our state universities. They would not go to the graduate school of Northwestern even, if it were not for the fact that they can take supplementary courses and additional courses at Garrett along with it.

In other words, it is a very limited group of men who have a specific objective in mind, who have a limited period of time to study and who cannot go here, there and different places picking up courses which, by themselves, might be of value to a prospective minister. They want to work

definitely toward a Doctor's degree in a university
104 that has prestige in the type of work in which they are going to be engaged.

Q. What type of work is that? A. Primarily teaching.

Q. In the field of theology? A. Yes.

* * * * *

Q. I show you a paper and I ask if you can tell me where it came from. A. This came out of our files.

Q. Out of the files of the Garrett Biblical Institute? A. Yes.

Q. I will ask you if you can tell us if you know the man whose name appears here—Merrill Jacob Holmes. A. Yes.

Q. Who was Mr. Holmes? A. He was a graduate
105 of Garrett and had the Swift Fellowship in the very early period of its history; I think probably the first man.

Q. Do you know where this application for fellowship came from? The form itself, I mean. A. It was sent to Garrett by the American University.

Q. And could you tell me if you know the handwriting under the heading "Endorsement by nominating college or university"? Do you know who signed that? A. Charles McCauley Stuart.

Q. Who was Dr. Charles McCauley Stuart? A. He was president of Garrett Biblical Institute.

* * * * *

(Document entitled "American University, Application for Fellowship", was marked as Defendant's Exhibit No. 4 for identification and received in evidence.)

* * * * *

106 Q. Doctor, was that the general form that was filled in each year by the persons seeking to make application for fellowships? A. As far as my knowledge goes, that has been used through the years.

Q. At any time was the name of American University filled in on any of those applications? A. Not that I know of.

Q. During the time that you were president, did you see them? A. Always.

Q. And was American University ever selected by
107 any of the graduates? A. Not at all.

* * * * *

Q. I show you a letter dated June 5, 1935, and ask you if you received that from Dr. Gray. A. I did.

Mr. Bastian: I offer this in evidence as Defendant's Exhibit 5.

(Letter, dated 6/5/35, Gray to Smith, was marked as Defendant's Exhibit No. 5 for identification and received in evidence.)

* * * * *

109 Q. As a result of that letter, what did you do? A. My recollection is that I sent him a rather strong telegram of protest to which he replied that no early change was anticipated.

He and I later met at one of our conferences and talked the matter over, and I never heard of it again.

Q. The next thing you heard was when the question was raised in 1941? A. Yes.

Q. You did nominate a student in 1941 at a university other than the American University? A. Yes.

Q. And in 1942 what happened? A. We nominated a student—two students—and sent the recommendation along, but, as I recall, it was stipulated by the University that if he accepted the fellowship, he would have to study
110 at the American University, and being unwilling to do so, the fellowship was never really awarded.

Q. Was the student unwilling to go to American University? A. Yes.

Q. Since that time, what has been done with regard to nominations, Dr. Smith? A. I think we went through the form of nominations on that same basis for the next two, possibly three years. And then concluded that it was rather anomalous to follow through a form that did not get anywhere.

Q. Why didn't it get anywhere? A. Because the men would not go to the American University and the American University would not award the fellowship unless they did go there.

Q. Unless they did go to American University? A. Yes.

Q. Is your institute willing now to nominate students for this fellowship? A. We certainly are; anxious to do so.

Q. Have you made any charge for your services in connection with this fellowship? A. None whatever. Whatever money has come to us from the American University has gone into to the student.

* * * * *

111 Q. Who would send you the application blanks to be filled in? A. I never was quite sure. Sometimes it came from the dean of the graduate school and sometimes from some other official.

Q. What I am getting at, did it come from American University or from your school? A. Oh, no, from the American University.

Q. And after it was received it was filled in by the student? A. By the students.

Q. And after the selection was made, the two names were submitted to the American University for decision? A. Yes.

Q. That has been true all through the years from 1915 to 1941? A. As far as I know.

Q. Well, do you know that awards were made every year? A. Yes.

Q. Of your personal knowledge? A. Yes, I have heard it announced year by year.

* * * * *

112 *Cross-Examination*

* * * * *

I believe you testified that most of your students, when they leave Garrett Institute, are interested in going into the field of teaching. A. In a very limited field of teaching.

Q. Do you ever have students graduating from Garrett who intend, instead, to go only into the ministry in the conduct of church work?

* * * * *

The Witness: Yes.

* * * * *

Q. Are they numerous? A. The big majority of our graduates become pastors of churches.

Q. Doctor, I notice in this letter written by Chancellor Gray, or former Chancellor Gray, which is Defendant's Exhibit No. 5, that in the second paragraph he says, "I can find here no correspondence relating to the establishment of the Swift Foundation. My predecessors apparently having either neglected or destroyed those vital documents."

113 I believe you have been here throughout the course of this trial, Doctor? A. Yes.

Q. Would you say now what you have heard and seen here yesterday and today, that there was no correspondence available? A. You mean correspondence with Garrett?

Q. Correspondence relating to the establishment of the Swift Foundation. A. No.

Q. Doctor, I believe Mr. Bastian asked you whether any charge was made for the services in your institution in the matter of this fellowship, and that you testified there was not. As I recall, you stated that whatever money was sent to Garrett was turned over in toto to the recipient of the fellowship. A. Yes.

Q. Isn't it a fact, Doctor, that frequently the money never passed through the hands of the Garrett Institute but was sent directly to the student? A. No, not in my day. It has come to us, I think. I would have to check on that.

114 Q. Perhaps I can refresh your recollection on that.

A. But whatever money is given goes direct to the student. Suppose we put it that way. I don't know whether it comes through us or not. I am not concerned.

Q. Do you know whether the money is made payable to the student or to your institute? A. Well, my recollection was that in the early days the money often came to us and we passed it on. Now, that may not have been the regular procedure.

Q. Dr. Smith, I will show you this Defendant's Exhibit No. 4, which was handed to you previously by Mr. Bastian.

That document is in the form of an application for a fellowship, isn't it? A. Yes.

Q. And on the back page where the form has provided for endorsement, it specifically states that that is to be the endorsement of the nominating college or university, doesn't it? A. Yes.

Q. And in this particular application the Garrett Biblical Institute's name is filled in as that of a nominator, isn't it? A. Yes.

* * * * *

126 *Further Direct Examination*

By Mr. Bastian:

Q. After the correspondence and interview that you had with Chancellor Gray, when was the first time that you knew that a change was contemplated by the American University in the Swift Fellowship matter? A. Dr. Douglass raised it in a letter, I think, in the autumn of 1941.

Q. And did you reply to that letter? A. Yes.

Q. Did you protest? A. As vigorously as I could.

Q. I show you this copy of a letter addressed to Dr. Douglass and ask you if that is the letter which you
127 wrote to Dr. Douglass. A. It is.

Q. Up to this time, that is December, 1941, all of the fellowships had been granted to students for study at institutions other than American University? A. Yes.

Q. And which was the last one that was granted? A. I think '41 was.

* * * * *

Mr. Bastian: I will offer this letter. I understand there is no objection.

The Court: Very well.

(Letter, dated 12/16/41, Smith to Douglass, was marked as Defendant's Exhibit No. 6 for identification and received in evidence.)

* * * * *

134 **Evidence in Rebuttal on Behalf of the Plaintiff.**

Thereupon, **Paul F. Douglass**, was called as a witness for and on behalf of the plaintiff in rebuttal, and having been previously duly sworn, was examined and
135 testified as follows:

Direct Examination.

By Mr. Colladay:

Q. Dr. Douglass, I hand you Defendant's Exhibit No. 4, being the form of application for a fellowship. A. Yes.

Q. Will you look that over, please, and tell the Court whether that is a special form for the Swift Fellowship?

* * * * *

136 This is the general form which was used in all of the fellowships which I previously mentioned in my testimony for the selection of fellows of the university who were appointed by the university upon recommendation of the Board of Award by the university trustees during this period of operation under the working plan.

* * * * *

Q. Dr. Douglass, will you explain to the Court, please, something which we have overlooked explaining, I believe, that is, the nature of this publication repeatedly referred to called the Courier? A. Yes, sir. The Courier, Your Honor, was a promotional leaflet which was published in the interest of fund raising, which we consider within the university to be of doubtful historical accuracy for the simple reason that different people at different times in the same publication made conflicting statements, always with the best of motives, under the zeal and enthusiasm of the moment, and each one of these things was covered by the shifting policy of the university in its effort to get in operation as a working institution.

* * * * *

137 Now, I would like to ask you if you have had a chance to look that letter over, whether you can enlighten the Court as to how the payments under the Swift Fellowship were made; whether through the Garrett Institute or directly to the recipient. A. They were made to the recipient.

Q. Does that letter there relate to one of these payments? A. It does.

Q. Would you mind explaining to the Court what that letter is? A. After drafting this resolution, which brings the case at issue, I handled this correspondence personally and each one of the letters was carefully thought out in my

office in terms of the action of the Board of Trustees based on our records.

This student was informed by us that under the authority of the Board of Trustees we could not disburse funds unless the student came to the American University to study. Despite that fact, the student, by the name of Paul M. Pettit, was appointed and this letter, Your Honor, dated October 9, 1942, is written from Hastings Hall, Union Theological Seminary, New York City.

* * * * *

139 *Cross Examination.*

By Mr. Bastian:

Q. Dr. Douglass, I take it that this gentleman never did get the money from you.

* * * * *

The Witness: The answer is no.

* * * * *

Q. I want to ask you also, Dr. Douglass, whether or not you give the degree of Master of Theology? A. We do not.

Q. I ask you further, Doctor, whether or not this catalogue number of the American University Courier is also colored by the shifting policy of the university, or whether
140 that contains anything that has been colored by the desire to raise funds?

* * * * *

A. The answer is that this is a statement of the academic program of the university for the years 1914 to '16, and as a catalogue issued for annual operation of the university, it reflects in my opinion adequately the program of the university as established on December, 1914, and as carried on through 1916. Nothing more, nothing less.

Q. And without color? A. I have not read this through carefully. I could not answer that.

Q. Have you read the American University Courier carefully enough to give the answer you did a while ago? A. I

have not only read it, I have studied every page in two volumes and worked over it carefully.

Q. Then will you look at page 16 of this one and see whether that is not also something that is taken from the Courier itself, under the heading of "Fellowships"? A.

Your Honor, I have already read into the record
141 from the minutes of the Board of Trustee this same
article and the answer is, yes, this is an adequate
summary of the statement already read in the record from
the minutes of the statement already read in the record
from the minutes of the Board of Trustees.

Q. And it is correct and without color? A. Yes, sir.

Q. But there are colorations in the Courier? A. Colorations, exaggerations, misstatements.

* * * * *

III.

EXHIBITS.

Plaintiff's Exhibit No. 1.

SWIFT CONTRIBUTION TO THE AMERICAN
UNIVERSITY

<i>Date</i>	<i>Designation of Fund To Which Gift Was To Be Credited</i>	<i>Amount</i>
5/10/05	General Fund	\$10,000.00
8/ 9/05	General Fund	15,000.00
6/21/07	General Fund	1,000.00
10/ 1/09	General Fund	1,000.00
9/30/13	Gustavus F. Swift Fellowship Fund	5,000.00
2/17/14	Gustavus F. Swift Fellowship Fund	6,000.00
7/ 6/14	Gustavus F. Swift Fellowship Fund	5,000.00
2/15/15	General Fund	1,000.00
7/ 7/15	General Fund	250.00
7/ 7/15	Fellowship and Scholarship Fund	750.00
7/19/15	Fellowship and Scholarship Fund	750.00
7/19/15	General Fund	250.00
10/ 9/15	General Fund	1,000.00
10/ 9/15	Fellowship and Scholarship Fund	1,000.00
7/11/16	Fellowship and Scholarship Fund	1,750.00
7/11/16	General Fund	750.00
3/ 8/17	Chancellor's House Fund	1,000.00
4/ 4/21	Americanization School	5,000.00
1923	Endowment Fund	25,000.00
TOTAL		\$81,500.00
* * * * * * *		

Plaintiff's Exhibit No. 2.

Don Farquharson

Dr. Douglass

Gustavus F. Swift Fellowship Fund

June 21, 1945

In accordance with your request to audit the Gustavus F. Swift Fellowship Fund, I wish to make the following report:

The American University received income as follows:

September 30, 1913—\$5,000 (p. 217)

January 17, 1914— \$6,000 (p. 219)

July 6, 1914— \$5,000 of Swift & Co. First
Mortgage Sinking Fund Gold
Bonds (p. 226)

The amount of the established fund was \$16,000. The record show in Journal - 9, dated May 1, 1920, that the above fund was invested in notes in the amount of \$3,000, and in bonds in the amount of \$13,000, or a total of \$16,000—the entire fund being invested.

At the close of business on August 31, 1944, the audited books of the University showed that the fund had shrunk to \$15,894.15. During the past two fiscal years of the school, the auditors had charged the fund with \$105.85.

* * * * *

Plaintiff's Exhibit No. 3.

Chicago, Ill.

May 12th, 1914

Trustees,

American University,

Washington, D. C.

Dear Sirs:

Referring to the enclosed letter concerning Swift & Co. bonds, I wish to say that if that proposition appeals to you

the bonds will be turned over to you in July 1914, instead of October, when the payment falls due.

However, it is entirely satisfactory to me to carry out our present agreement, if, in any way, it suits your plan better.

Yours truly,

Annie M. Swift

(Mrs. G. F.)
4848 Ellis Ave.

* * * * *

Plaintiff's Exhibit No. 5.

Chicago, Ill., July 3rd, 1914.

Mr. Franklin Hamilton, President,
The American University,
1422 F. Street, N.W.,
Washington, D. C.

Dear Sir:-

Referring to my total pledge to the American University of \$15,000.00, of which I paid \$5,000.00 in October, 1913 and \$6,000.00 in January, 1914, leaving a remainder of \$5,000.00, concerning which I wrote you in May this year, suggesting to supply Swift & Company, first mortgage, sinking fund 5% gold bonds, which you personally acknowledged under date of June 1st.

I enclose you herewith five bonds, numbered as follows:

M-5654,	to the amount of \$1000.00
M-5655	" " " " "
M-5656	" " " " "
M-5657	" " " " "
M-5658	" " " " "

which I figure relieves me of all obligations to your institution and would appreciate having you write me promptly, confirming this understanding.

Yours very truly,

Mrs. Ann M. Swift.

Above bonds received July 6, 1914, at office of American University, and deposited same day with Charles C. Glover, Treasurer, at Riggs National Bank.

Albert Osborn.

* * * * *

Plaintiff's Exhibit No. 6.

Filed Sept. 27, 1949.

GREAT NORTHERN HOTEL
John C. Roth, Manager

European Plan

Absolutely Fire Proof

Rooms Without Bath 1.50, 2.00, 2.50
With Private Bath 2.50, 3.00, 3.50 & 4.00
Jackson Blvd. Dearborn & Quincy St.
Chicago.

Oct. 7, 1913

Rev. Franklin Hamilton, Ph. D.,
Milton, Mass.

Dear Doctor,—

It is a pleasure to write you tonight as I trust this will bring joy to your heart as it did to mine to secure an additional pledge for our cause of six thousand dollars (\$6,000).

Mrs. Swift agrees to increase her subscription to a total of \$16,000 the same to be a perpetual foreign fellowship for Garrett Biblical Institute at Evanston. I told her you certainly would agree to this proposition and she gave me the additional subscription for \$6,000 payable on or before Jan.

15, 1914. This is to be known as the "George F. Swift" fellowship. This will help our work greatly:—

1. Because those who once scoffed now look up in gratitude and will either praise our cause or be silent.
2. It will be an annual advertisement of the University, thus taking for a time the talking place of a student clientele.
3. It will help mightily to advance our standing in all the middle west.
4. In a tentative way I laid the matter before Dr. Chas. Stuart and he is as tickled as your little daughter ever is over the gifts you bring her.
5. It makes possible a fellowship prospect from Mrs. Swift's sons to be given in her name.

Of course all final arrangements as to when this fellowship will be available to Garrett is left open for you to settle. The only things I have done are to take the additional subscription to be added to the \$10,000 already given, to assure Mrs. Swift this would meet your approval and to discuss in a general way the possibility of the above fellowship with Dr. Stuart. I am sure in a few years it will yield many times the \$800.00 income as an influence to aid us in getting other gifts from this section.

There are some others to see here this week who can help if they will.

I am sending this to your home to be forwarded if you are not there. The subscription goes to the office.

Very truly,

Fred M. Stone.

P. S. Address me at Indianapolis.

* * * * *

Plaintiff's Exhibit No. 7.

Filed Sept. 27, 1949.

GREAT NORTHERN HOTEL
John C. Roth, Manager

European Plan

Absolutely Fire Proof

Rooms Without Bath 1.50, 2.00, 2.50
With Private Bath 2.50, 3.00, 3.50 & 4.00
Jackson Blvd. Dearborn & Quincy St.
Chicago.

Oct. 8, 1913.

Rev. Franklin Hamilton, Ph.D.,
Milton, Mass.

Dear Doctor,—

Today I took up the "fellowship" plan with Dr. Harris of The Northwestern and he enthusiastically fell in with the idea. He heartily approves your plan of opening and course of procedure. He thinks you have found the proper solution to the opening and initial development of the University and assured me we could count on his cordial personal influence in every way. He told me that while the Northwestern would continue its post-graduate work in the M.A. degree, now, with the developments of our work he was ready to turn the higher Ph.D. work our way. It was truly refreshing to have Drs. Harris and Stuart so delightfully enthused and interested.

Each is now fully committed to our cause. Dr. Harris and I are to try to arrange to see Banker Harris as soon as it can be judiciously brought about. By the way, Mr. Swift's first name was Gustavus instead of George. I wish you would write Mrs. Swift a letter of appreciation and I leave this to your judgment. This Garrett fellowship has changed the attitude of some men most happily in our favor. It certainly helped me to plan for things heretofore seemingly impossible.

May I offer this suggestion in regard to the Swift fellowship for Garrett; reserve to The American University the right to use income for other students than those of that institution if Garrett at any time has no nominations to make and also reserve the right not to accept a nominated student if unsatisfactory to the Board of Award. It seems to me these conditions should be a part of each fellowship contract held in perpetuity by any of the various institutions which may in the future be entitled to the same by special gift or otherwise.

By the way Mrs. Swift has promised to endeavor to open the way for me to see her sons.

With best wishes,

As ever,
Fred M. Stone.

* * * * *

Plaintiff's Exhibit No. 8.

Filed Sept. 27, 1949.

GREAT NORTHERN HOTEL
John C. Roth, Manager

European Plan	Absolutely Fire Proof
Rooms Without Bath	1.50, 2.00, 2.50
With Private Bath	2.50, 3.00, 3.50 & 4.00
Jackson Blvd. Dearborn & Quincy St.	
Chicago.	

Oct. 9, 1913.

Rev. Albert Osborn, B.D.,
Washington, D. C.

Dear Brother Osborn,—

Enclosed find an additional subscription from Mrs. G. F. Swift for six thousand dollars (\$6,000). It is given on condition that the total sixteen thousand (\$16,000) shall become a fellowship in perpetuity for Garrett Biblical Institute at Evanston, Ill. Kindly acknowledge the receipt of the same to her as well as to me.

I am working out a plan which let us hope will also give the five other fellowships I mentioned while in the office last month. You will note that this is to be paid in January 1914, so it will soon begin to earn the needed interest for that fund.

She wishes it called in memory of her husband "The Gustavus F. Swift Fellowship."

I trust you have had a pleasant time at the conferences.

With best wishes,

As ever,

Fred M. Stone.

* * * * *

Plaintiff's Exhibit No. 9.

**ENDOWMENT SECRETARY'S REPORT
DEC. 17, 1913**

THE AMERICAN UNIVERSITY
WASHINGTON, D. C.

Office
1422 F Street, N.W.

December, 1913.

To the Board of Trustees of
The American University.

LADIES AND GENTLEMEN,—

I herewith submit my eleventh semiannual statement for your consideration. During the past summer data and suggestions relating our work were furnished the editors of the Northwestern Christian Advocate, printed at Chicago, and the Western Christian Advocate, printed at Cincinnati, and each paper published an excellent editorial. These articles brought the University to the attention of more than 100,000 readers in Ohio, Kentucky, Indiana, Illinois, Wisconsin, Minnesota and Iowa. As a result these readers are beginning to appreciate more intelligently our cause

and its importance. The editorials have aroused to active support many who heretofore have been indifferent.

I have also represented the University in churches, ministers' meetings and at conferences. It is a pleasure to report to you that it has been my privilege to secure the funds for the first fellowship as outlined by your action last May. Mrs. Annie Swift of Chicago, the widow of the late Gustavus F. Swift, has given this in the name of her deceased husband. Of the total necessary pledge thereto, \$16,000, she has paid in \$5,000, \$6,000 more will be paid before Jan. 15, 1914 and the remaining \$5,000 on or before next October 1st. The fellowship is assigned to Garrett Biblical Institute in perpetuity. This institution is our large and successful theological school at Evanston, Ill. You at once see the advantages such a fellowship gives as a annual advertisement of our University at the commencements of this great seat of learning. Allow me to add I have six other fellowships in an encouraging process of development. Part of these it is hoped to put into definite form before the opening day, June 4, 1914.

The total amount secured in cash and pledges since your last board meeting is \$7327—cash \$1319, pledges \$6008.00. \$6000 of these pledge subscriptions are to be paid by Jan. 15, 1914.

The work of an Endowment Secretary has this feature which makes impossible an accurate or exhaustive statement at any given time of all that is being accomplished in this department. Money is coming in each month in varying sums, new pledges are signed and future prospects are being put into definite form. So one is unable to state fully just the amount actually to be depended upon. Yet is it safe to say that, not counting over \$100,000 which I deem a conservative estimate of the known encouraging prospects, during the period of now nearly six years as your Endowment Secretary these has been secured in cash, pledges, endowment bonds and wills a total of over \$300,000. Of this sum, while I have not the exact figures at hand, more than

\$90,000 in cash has been paid in and invested or applied to the needs of the University.

In conclusion let me add also this word of encouragement, it is easier now that we are about to open for academic work to raise \$5.00 than to raise \$1.00 six years ago.

Respectfully submitted,

FRED M. STONE.

* * * * *

Plaintiff's Exhibit No. 10.

EXCERPTS FROM AMERICAN UNIVERSITY COURIER

Vol. XXI, No. 3

December, 1914

CATALOGUE NUMBER
1914—1916

FELLOWSHIPS

The policy of distributed efficiency is one of the vital elements of the university. This policy is put into operation through the medium of university fellowships. This plan of fellowships will afford opportunities for covering the whole field of knowledge, and thus will complete the scheme of university study beyond what is afforded at Washington.

So far as practicable such fellowships will be established and supported from the university funds. To students who thus are granted fellowships there will be opened at once the highest academic opportunities; for a fellowship will enable a student to pursue work at the institution and in the environment which for his purpose shall offer the largest possible advantages.

FELLOWSHIPS OF TWO CLASSES

(A) Fellows who pursue their studies at seats of learning or at places of study and investigation within the United States. A fellow of Class A shall receive a stipend of \$600 per annum.

(B) Fellows who pursue studies at foreign seats of learning or at places of study and investigation abroad. A fellow of Class B shall receive a stipend of \$800 per annum.

ADMISSION TO FELLOWSHIPS

Students shall be admitted to fellowships upon the nomination of the school, college or university from which the candidate holds a baccalaureate or higher university degree. The nomination, however, is subject to confirmation by the officers of the American University and by the Board of Award.

TENURE OF FELLOWSHIPS

Appointment to a fellowship shall be for one year, subject to renewal for a second year. In special cases a fellowship may be held for a third year, but no longer. The officers of the American University shall decide upon the length of the term of each fellow.

THE WORK OF A FELLOW

A fellow shall pursue study in such subject or subjects and at such seats of learning or at such places as shall be recommended by his nominating school, college or university, subject to the approval of the officers of the American University. During the pursuit of such study the student shall be classified as a fellow of the American University, and he must make a semi-annual report to the authorities of the American University concerning his work. Where the study is made under the auspices of some other academic institution each report from the fellow shall be accompanied by an official statement from that institution. The second semi-annual report must be in the hands of the officers of the American University thirty days before the date of the University Convocation.

APPLICATION FOR FELLOWSHIPS

Candidates for fellowships in the university will apply to the registrar, Mr. Osborn, for application blanks. These blanks when made out must receive the endorsement of the

institution which granted the candidate his or her baccalaureate or other subsequent degree. The fact that the same institution thus may be called upon to endorse the application of several of its alumni in no case will militate against any applicant, since the final choice of the fellow is made by the Board of Award of the American University.

It is also to be borne in mind that, since actual rank in the classes of the institution which recommends the candidate will not decide the final selection of a fellow, any additional fact or information concerning the candidate that bears on such selection is desired by the Board of Award. Such information might be classed under the heads: health, life-plan, character, qualities for leadership, personal initiative, etc. Such information may be furnished by reputable persons best acquainted with the candidate.

After the blanks have been filled out in accordance with the printed directions they are to be forwarded to the registrar of the American University. They then will be transmitted to the Board of Award, who will take final action upon them. If desired by the Board of Award the candidate must be prepared to appear before the board to answer any inquiries or to meet such tests as the board may order.

GUSTAVUS F. SWIFT FELLOWSHIP

Through the generous gift of Mrs. Gustavus F. Swift there has been endowed a fellowship in memory of her husband, the late Mr. Gustavus F. Swift, of Chicago, Ill. This fellowship will afford an estimated income of about seven hundred and fifty dollars each year. The incumbent of the fellowship is to be a graduate of Garrett Biblical Institute.

* * * * *

Plaintiff's Exhibit No. 11.

Filed Sept. 27, 1949.

ESTABLISHED 1855

GARRETT BIBLICAL INSTITUTE

A THEOLOGICAL SEMINARY OF THE METHODIST EPISCOPAL CHURCH
EVANSTON, ILLINOIS

ROOM OF THE PRESIDENT

CHARLES M. STUART

February 17, 1915.

My dear Chancellor Hamilton:

The time is approaching when we ought to be able to take definite steps in awarding the American University Scholarship, which has been assigned by you to us. May I ask just what your idea of the procedure ought to be. As I understand it, we were to nominate, you were to confirm and to direct the subsequent work of the man selected.

Upon this whole matter I have received no written word either from yourself or Mr. Stone, and while of course the announcement was made on your personal assurances that your trustees had authorized the transaction, I should be glad to have a statement from you that could be made a matter of record by our trustees.

What a happy gift you have of making a place for yourself in the affections of the people you speak to! I am constantly running across men who recall your presence and address at the conference with grateful memories.

I wish we might have you here at school some time. I should like to have you see our men and, better still, I should like to have our men see you.

Very cordially yours,

Charles M. Stuart,

President.

The Reverend Franklin L. Hamilton, D.D.,
American University,
Washington, D. C.

Feb. 24, 1915.

President Charles M. Stuart,
Garrett Biblical Institute,
Evanston, Illinois.

Dear President Stuart,—

Your letter of Feb. 17th relative to the Fellowship for Garrett Biblical Institute has been received. The blanks of application for the Fellowships are now going through the press. As soon as they are in hand blanks will be sent to you with all information. It is our present plan to make a first assignment of Fellowship to Garrett at our first Convocation Day, May 26. We plan to make the assignment operative for this coming academic year in any event.

Many thanks for your personal greetings, inimitable and gracious as yourself.

Cordially yours,

Feb. 26, 1915.

President Charles M. Stuart, LL.D.,
Garrett Biblical Institute,
Evanston, Ill.

Dear President Stuart,—

Enclosed find two application blanks for a fellowship in the American University. Our thought in sending you two is that in a matter of this kind there should be not only the one nomination by your faculty, but two, as this would give you an opportunity of providing either for an alternate, if this should be your preference, or would allow you to cover two distinct fields in your nomination, leaving the final decision to our Board of Awards. Thus you might nominate not only some young man just leaving your school, but also in addition some older man who had been some time in the work and whom you would be glad to see relieved from work and helped to a year of serious study in some chosen field. This would do two things; (1) First it would allow

your school to recognize both classes of men, the young graduate and the man in the midst of his life work; and (2) Second it would also allow us freedom of choice between the two classes of men. Or, if you prefer simply to nominate two of your most recent graduates that, of course, would be for you to decide.

One thing, however, in any event, I wish you kindly would do. In addition to the formal endorsement which in the name of Garrett Biblical Institute you will enter on both application blanks, will you be kind enough to send to this office a personal letter stating frankly which of the two men is your first choice and why? This will enable us to act having before us all the light that there is.

The estimated income from the fellowship which we shall assign to Garrett Biblical Institute for the coming year will be seven hundred and twenty five dollars (\$725). Some delay in investments together with the necessity of providing against loss of income through lapsing of interest on uninvested funds practically fixes this figure. I hope that in subsequent years the amount may be increased by a few dollars. But we are investing all our endowment funds in such reliable securities that the income is not very high.

As to the time for the return of these blanks filled out, we shall be glad to have them at your early convenience. The reason for this is that we desire to make public announcement on May 26 of the appointments, and our Board of Award ought to have ample time to consider the cases prior to this date.

The first quarterly payment of this fellowship will be made in October, 1915. All further details of information you will find on page sixteen (16) of the American University catalogue a copy of which is being forwarded to you at this time.

With kindest regards and best wishes to you and yours,
I am

Ever yours,

Plaintiff's Exhibit No. 12.

Filed Sept. 27, 1949.

ESTABLISHED 1855

GARRETT BIBLICAL INSTITUTE
A THEOLOGICAL SEMINARY OF THE METHODIST EPISCOPAL CHURCH
EVANSTON, ILLINOIS

ROOM OF THE PRESIDENT
CHARLES M. STUART

June 8, 1917.

The Reverend Bishop John W. Hamilton, D.D., LL.D.,
American University,
Washington, D. C.

My dear Bishop John:—

I need not tell you how surprised and disappointed we were on receiving Mr. Osborn's telegram that the American University had divided the Swift Fellowship between Holmes and Lewis. Of course the question of the man is entirely subordinate to the question of the method and I am sure you will agree with us that, if the fellowship is to be of any use to us whatever, the award must turn upon our nomination and not upon your independent selections.

Alike from what your brother wrote in his letter to us in connection with the first award; from what Dr. Stone told us when he communicated the transfer of the fellowship to our school; and from precedents already established by you in the award of other years, we had a right, I think, to expect that our nomination would be final with you. You will not blame us if we do not see the justice of your taking the matter into your own hands on this particular occasion. We certainly could have no interest in the award of a fellowship which was made without regard to the deliberate and studied conclusions of the faculty, who have trained the men and who know the men. I venture to express

the hope that you will have the action reconsidered and that our nominations to you will have their due consideration.

With assurances of sincere personal regard believe me,

Cordially yours,

Charles M. Stuart,

* * * * *

Plaintiff's Exhibit No. 13.

THE AMERICAN UNIVERSITY
WASHINGTON, D. C.

BISHOP JOHN W. HAMILTON
Chancellor

July 2d, 1918.

MY DEAR BROTHER STUART: What I have written is what my brothers told me when we canvassed your first letter to me concerning the Swift Fellowships. All the terms were settled before I came here.

First, the Board of Award as the name implies awards the Fellowships, after due examination, according to their best judgment.

Second, all applications receive precisely the same consideration, without fear or favor.

Third, applicants are graded according to their qualifications, and achievements, including those nominated on Foundations and by Faculties.

Fourth, if at first the applicants do not succeed they can try again the next year.

Fifth, the Swift Endowment is for Fellowships for graduates of Garrett Biblical Institute.

Sixth, the Faculty of Garrett Biblical Institute is authorized to nominate the applicants—at least two.

Seventh, if neither of these should be deemed qualified to receive the Fellowship, according to the judgment of the Board of Award, the Faculty can nominate again, and again until the Fellowship is awarded; the income of the Swift

Endowment is to to furnish Fellowships for graduates of Garrett Institute and none other.

Now, I have had the Bookkeeper give me the account of the income of the Swift Endowment, and the books show only (\$480) Four Hundred and Eighty Dollars in the Treasury. You must see we cannot award more money than we have.

We must depend on our investment Committee to furnish the income. There are three Bank Presidents on the Committee. One of them, our Treasurer, President of the largest bank in the District and one of the great banks in the country; they are all conservative men and will not invest except on First Mortgage in the District. When one investment comes due the money sometimes lies in the Bank with little or no income, until another investment can be made. And as I have written before the Swift Endowment along with others must bear its fair share of overhead charges. I trust I have made the statement clear and satisfactory. I am affectionately,

Your brother,

JOHN W. HAMILTON.

* * * * *

Plaintiff's Exhibit No. 14.

ESTABLISHED 1855

GARRETT BIBLICAL INSTITUTE

A THEOLOGICAL SEMINARY OF THE METHODIST EPISCOPAL CHURCH
EVANSTON, ILLINOIS

ROOM OF THE PRESIDENT

CHARLES M. STUART

The Rev. Bishop John W. Hamilton D. D., LL.D.,
American University,
Washington, D. C.

My Dear Saint John:—

This is to acknowledge your letter of July 6th upon which I would like to reserve comment for the present. As you very well know, we are very glad to have the fellowship at our disposal and I am taking up this question with you only that we can have a proper understanding of our relation to the nominations and awards. This seemed both advisable and necessary to us, since in one instance the award was made without our nomination. This lead us to think that the Board of Award has powers transcending ours in the matter of naming candidates.

Very cordially yours,

CHARLES W. STUART.

I know of no instance in which we had not from Dr. Stuart the nomination for the specific (Swift) Fellowship or the nomination for one of the general Fellowships.

A. OSBOEN.

* * * * *

Plaintiff's Exhibit No. 15.

745 Orange Street,
New Haven, Conn.,
Aug. 14th, 1922.

Mr. Albert Osborn, Registrar,
American University,
Washington, D. C.

Dear Sir:

I am writing you with reference to the address to which you could send the money for the Swift Fellowship, which was awarded to me last June. On the 25th of this month I am sailing for Palestine to spend the academic year in study and research in the American School of Oriental Research in Jerusalem. Now when the payments come due you could deposit the money to my credit in the Second National Bank of New Haven, Conn., and then they could send me a letter of credit, or you could send the draft directly to my address over there. I am not experienced in these matters and do not know just which would be the better plan, or perhaps there might be some provision on your part that would make it necessary to have the funds come directly to me. So if you could advise me as to your preference, I would appreciate it greatly.

I can be reached at the above address for at least another week, and my foreign address will be, care, American School of Oriental Research, P. O. Box 333, Palestine, Jerusalem.

Yours truly,

EDWARD E. VOIGHT.

* * * * *

Plaintiff's Exhibit No. 16.

Friday, October 18th, 1929.

Chancellor Lucius C. Clark,
The American University,
Washington, D. C.

Dear Chancellor Clark:—

The enclosed letter dated October 7, 1929 from Theodore A. Loeppert, Leipzig, in reference to Swift Fellowship, etc., received, without comment.

Will you not please advise me the amount to be paid, if any, to Mr. Loeppert, if out of the Swift fellowship and what period of time it is to cover, as I feel the need of further authorization before making payment.

I should say this should also apply to other fellowships.

Faithfully yours,

Treasurer, The American University.

WSC/EM.

Enc.

* * * * *

Plaintiff's Exhibit No. 17.

Filed Sept. 27, 1949.

GARRETT BIBLICAL INSTITUTE
NORTHWESTERN UNIVERSITY
EVANSTON, ILLINOIS

June 5, 1937.

Dr. Ernest F. Griffith
Dean of the Graduate School
American University
Washington, D. C

My dear Doctor Griffith:

During my enforced absence from the school, caused by a visit to the Evanston Hospital, certain correspondence has been carried on with you concerning the Swift Fellowship for next year.

As I understand the situation, the question was raised as to whether or not you would be willing to divide the fund between two men who stood at the top and were very close to one another in the matter of grades. The decision was that 60% should go to Mr. Julian Hartt and the remainder to Mr. Keith Jones.

Trusting that this will be satisfactory to you and your Committee and with every good wish, I am

Very sincerely yours,

(signed)

President.

* * * * *

Plaintiff's Exhibit No. 18.

Filed Sept. 27, 1949.

GARRETT BIBLICAL INSTITUTE
EVANSTON, ILLINOIS

OFFICE OF THE PRESIDENT
FREDERICK CARL EISELEN

October 13, 1925.

Chancellor Lucius C. Clark,
The American University,
Washington, D. C.

My dear Chancellor Clark:

Thank you very much for your recent letter explaining your attitude in the matter that has arisen in connection with the award of the Swift Fellowship to Mr. Godfrey Tietze for the year 1924-25.

I am not sure that your letter gives enough consideration to the difficult position in which Mr. Tietze has been placed, certainly without any fault on his part.

First: It is true that Mr. Tietze "did not see fit to use it" during 1924-25, but it is equally true that he did not use it because he was definitely informed by Dr. Collier, who has

handled all matters connected with this fellowship ever since it was established, that it would be perfectly all right for him to postpone the use, and that he would receive the money during the year 1925-1926.

Second: The practice of postponing the use of a fellowship is not unknown. Indeed, postponements of this sort are permitted constantly, so that in the light of the practice followed by other institutions there was no reason whatever why Mr. Tietze should have any question as to the reliability of the promise made regarding the postponement in this particular case.

Third: Since Dr. Collier had always appeared as the official representative of the American University in matters relating to this fellowship, there was no reason why either Mr. Tietze or I should question his authority in making these statements. Moreover, Dr. Collier states, "There cannot be the slightest doubt about my taking up the matter of the postponement of the use by you of the fellowship with Chancellor Clark. Not only that, but I consulted the members of the Academic Council. The Chancellor approved of the action which we took." From all this it would seem that we had every reason to believe that the postponement in the use of the fellowship had the full approval of all the authorities of the American University.

Fourth: Your letter states: "If it had been the desire of Mr. Tietze and the authorities of Garrett to renominate Mr. Tietze, it should have been done. Instead they nominated another." What else could be done under the circumstances? Both Mr. Tietze and the school had been informed officially that the fellowship awarded for 1924-25 would be available for 1925-26. What ground was there for any doubt on our part that that promise would be kept, and so, what reason could we have for a renomination? We did the only thing that was possible in the light of all the information which we had.

On the basis of all the correspondence thus far, I still cannot see that in fairness to all concerned the money can

or ought to be withheld from Mr. Tietze. I sincerely hope that you will see your way clear to allow the original agreement to be carried out; and of course knowing your position in the matter of postponing the use of the fellowship, there would seem to be no opportunity of having a similar misunderstanding arise in the future. But I sincerely hope that in view of all that has gone before, Mr. Tietze will not be made to suffer for something for which he cannot be held responsible.

Yours very truly,

F. E. Eiselen,
President.

* * * * *

Plaintiff's Exhibit No. 19.

Filed Sept. 27, 1949.

Nov. 5, 1907.

Dr. Hamilton.

Dear Sir,

I was pleased to see Dr. Gutheridge and wife and to hear of your plans for The American University and said I would consider the proposition of endowment of a chair. Your letter is very kind and I thank you for your appreciation and suggestions. There is one thing I would like to learn not mentioned in your letter which is cost of chair endowment in the University. Then I will write you more fully. I am somewhat fearful it is more than I shall feel able to do. I am not able now to consider large amounts.

Yours sincerely,

Annie M. Swift.

Mrs. G. F. Swift

4848 Ellis Ave.

Chicago, Ill.

Nov. 5th, 1907.

* * * * *

Plaintiff's Exhibit No. 20.

Filed Sept. 27, 1949.

Nov. 10, 1907.

Dr. Hamilton.

Dear Sir,

Your letter of Nov. 3rd at hand, on receipt of which I promised to write you more fully which I do now.

As I said before I told Dr. Gutteridge I would consider the matter of endowment of a Chair in The American University. I did not intend this should be a very encouraging remark as I felt rather doubtful of my ability to do so. I understand the endowment ought to be enough for the yearly interest to well support a Professor in some department of learning. I have now I think carefully considered the matter and I find I have made some pledges I fear more than I ought (considering the condition of finances) some of them conditional, which I hardly expected would be due for one or two year or perhaps longer, but I find some are due now some a little later & etc. and it will amount to all I can do for some time.

I also feel that my sons are doing all they wish to do and I do not want to bring the matter up with them. Consequently I do not see how I can possibly endow a chair and must ask to be excused from it. There is another thing I could hardly think of doing which would be to endow a chair for Mr. Swift before one should be endowed for each of our deceased Presidents Hurst & McCabe. I am sorry I cannot help by this endowment.

With best wishes for the University, I am

Sincerely yours,

Mrs. G. F. Swift
4848 Ellis Ave.
Chicago, Ill.
Nov. 16, 1907.

Annie M. Swift.

* * * * *

Defendant's Exhibit No. 2 for Id.

Filed Sept. 27, 1949.

GUSTAVUS F. SWIFT FELLOWSHIP FUND

The income to be awarded to an alumnus of Garrett Biblical Institute to be nominated by the Institute. Mrs. Swift contributed as follows:

Sept 30, 1913.....	\$5,000
January 17, 1914.....	6,000
July 6, 1914	5,000
Oct. 9, 1914.....	1,000
Total.....	\$17,000
	(A. O.)

* * * * *

Defendant's Exhibit No. 3 for Id.

Filed Sept. 27, 1949.

SWIFT, Gustavus F. \$15,901.45

On December 17, 1913, Mrs. Gustavus F. Swift of Chicago was reported in the Chancellor's report to have added a new fellowship fund in the amount of \$16,000.

According to a holographic memorandum of Dr. Osborn's, payments were made on the fund as follows:

September 30, 1913.....	\$5,000
January 17, 1914.....	6,000
January 6, 1914	5,000
October 9, 1914.....	1,000

Dr. Osborn's memorandum also says: "the income to be awarded to an alumnus of Garrett Biblical Institute to be nominated by the Institute.

According to a memo. from Mr. Walters, the final \$1,000 was not to be included in the scholarship fund.

See dittoed memorandum.

* * * * *

Defendant's Exhibit No. 4.

Filed Sept. 27, 1949.

**AMERICAN UNIVERSITY
APPLICATION FOR FELLOWSHIP**

Application of—Merrill Jacob Holmes.

Graduate of—Garrett Biblical Institute.

Subject of Proposed Study—Philosophy or Religion.

Institution or Place of Proposed Study—Harvard University.

Date of Application—12 May 1915.

AMERICAN UNIVERSITY

APPLICATION FOR FELLOWSHIP FOR GRADUATE STUDY

Please fill out this application and return it promptly to the
Registrar of the American University, Washington,
District of Columbia.

1. Applicant's name in full (no initials) with Post Office address:
Merrill Jacob Holmes, Evanston, Illinois.
2. Subject of proposed study:
Religious Philosophy.
3. Institution or place of proposed study:
Harvard.
4. Are you married or single?
Married.
5. Condition of health and strength:
Excellent.
6. Date and place of birth (year, month and day):
September 1, 1886.
7. Preparatory school attended and period of attendance:
Public and High Schools at Des Moines, Boone,
Denison & Red Oak, Iowa.
8. College or university attended and period of attendance:

Simpson College (Iowa), Four years.

Garrett Biblical Institute, Three years.

Northwestern University, One year.

9. Bachelor's degree and year of graduation (stating name of college):

A.B., Simpson College, 1908.

10. Other degrees received, with date and names of institution granting degrees:

B.D., Garrett Biblical Institute (1912) and M.A., Northwestern, 1912.

11. What subjects have you particularly studied?

Philosophy, Psychology, Theology and Bible.

12. Mention any graduate work done, stating:

(a) Name of college or university—Northwestern.

(b) Time spent—One year.

(c) Subjects pursued—Philosophy.

13. List (with copies enclosed) of any papers you have published in the special field of your studies:

None. Thesis: Deterministic Elements in the Writings of St. Paul.

14. Intended career, if already decided:

Pastor and Teacher.

15. In case more than one year of graduate study is contemplated, please so state:

Two and possibly three.

16. State whether you are a candidate for a degree, and, if so, for what degree?

Ph.D.

17. State whether you can read French and German works in your chosen field of study:

Both with a degree of readiness.

Endorsement by Nominating College or University

[This section is to be filled out by the authorities of the nominating institution]

- What college or university nominates you?

Garrett Biblical Institute.

What subjects for your study does the institution recommend?

Philosophy of Religion and Cognate branches.

Signature of the official representing the nominating institution:

Charles M. Stuart, President.

Additional Endorsements

What personal letters, documents or other serviceable information do you offer beyond what is covered in the questions above printed?

Reference by permission to

President F. L. Strickland, Indianola, Iowa.

Professor J. A. James, Evanston, Illinois.

Rev. T. P. Frost, Evanston, Illinois.

Rev. J. F. St. Clair, Washington, D. C.

* * * * *

Defendant's Exhibit No. 5.

THE AMERICAN UNIVERSITY
WASHINGTON, D. C.

OFFICE OF THE CHANCELLOR

June 5, 1935.

President Horace G. Smith, D. D.,
Garrett Biblical Institute,
Evanston, Illinois.

My dear Doctor Smith:

I am trying to classify the fellowship situation in The American University. We have established six full-tuition fellowships in our Graduate School—confined, of course, to the social sciences as our graduate work is—and through the generosity of the Italian Embassy we have been granted three exchange fellows with Italian universities for study in political and social sciences. But our Massey Fellowships and the Swift Foundation Fellowship are curiously conditioned. Garrett nominates to us one of its

students to study somewhere other than the American University. I think the Swift Fellowship should enable an American University student to go to Garrett or a Garrett student to come here, preferably the former. I could send a student on that fellowship every year, which would probably mean from one to three additional students from here.

I can find here no correspondence relating to the establishment of the Swift Foundation, my predecessors apparently having either neglected or destroyed those vital documents. Will you please write me who is the representative now of the Swift Foundation and who has authority to direct its operation. Tell me who he is and where he lives and let me undertake to re-establish the Foundation more intelligently.

I hear only good of your progressive administration. More power to you!

Very cordially yours,

Joseph M. M. Gray,
Chancellor.

JMMG/C

* * * * *

Defendant's Exhibit No. 6.

December 16, 1941.

Dr. Paul F. Douglas, President,
The American University,
Washington, D. C.

My Dear Dr. Douglas:

I deeply regret that I cannot cooperate in the promotion of the proposal made in your letter of December 5, concerning the modification of the Swift Fellowship Award. Your proposal in my judgment diverts the income from a gift secured by an alumnus of this school from a friend of this school to a use other than that for which it was solicited, and for which it was given to the American University.

Aside from a letter of inquiry from Chancellor Gray, dated June 5, 1935, no such question as you now raise has

been presented since the funds were given by Mrs. Swift more than twenty-five years ago. In making his inquiry, Chancellor Gray frankly said, "I can find here no correspondence relating to the establishment of the Swift Foundation, my predecessors having apparently neglected or destroyed the documents."

You now say that you "fail to find anything in the documentary evidence which conflicts with an action of this kind (your proposal) on the part of the Board of Trustees." Do you find anything in these documents which justifies such a change? Ordinarily the burden of proof is on those who propose radical changes.

In reply, let me submit copies of certain documents and supporting statements which in my judgment do conflict with the attempt to limit this award "to American University students to study at Garrett Biblical Institute or to students at Garrett Biblical Institute to study at the American University." These documents not only conflict with your proposal, but justify the unbroken procedure followed for over twenty-five years.

First of all, there is the report of President Stuart to our Board of Trustees, dated October 11, 1913. I have marked this Exhibit A. While I have not yet found the documents upon which he based this report, I assume that no one would question the authenticity of his statement since the plan was accepted by those in authority at both institutions at the time and ever since then, with the sole exception of Chancellor Gray's letter referred to above. Following this announcement by President Stuart the Garrett faculty proceeded to nominate men to receive the award, and the faculty of the American University followed the unbroken procedure of awarding the Swift Fellowship to a Garrett graduate. Evidently both faculties understood that they were to proceed with the plan in accordance with the announcement made by President Stuart and the statement as outlined and published in an official bulletin of the American University.

In the next place, please note the announcement taken from the American Courier, Vol. 2, No. 3, page 16, and dated December, 1914. I assume, though I do not know, that this same statement was published in other copies of the Courier. This announcement clearly outlines the plan and purpose of the elaborate system of fellowships then under consideration by the American University. Doubtless it was on the basis of this official statement that an alumnus of Garrett Biblical Institute, then acting for the American University, persuaded Mrs. Swift to invest her funds in an institution so far away from home to help an institution so near to home. Even a cursory reading of this document will show that the plan of the whole fellowship system was to enable a selected college graduate to pursue advanced studies in such an institution at home or abroad as "for his purpose shall offer the largest possible advantages." So far as the Swift Fellowship is concerned an added limitation stipulates that "the incumbent of the fellowship is to be a graduate of Garrett Biblical Institute."

The documents noted above are supported by letters from F. M. Stone who secured the gift, from Franklin Hamilton and John W. Hamilton, as well as by letters and printed forms by Frank W. Collier who handled all the correspondence for the American University for many years. Chancellor Clark carried on a long correspondence with President Eiselen concerning a disagreement as to an award made one year. In all that correspondence he never once raised the issue before us now. In other words, he accepted, as practically all others have done, the original plan by which the award went to a Garrett graduate who was free to choose his place of study.

The documents are likewise supported by the clearcut memory of Dr. Rall who became a member of this faculty in 1915, and from year to year has been in particularly close touch with the nominations for this fellowship. He was and is familiar with the whole proceeding as well as with the understanding of the situation as held by Dr. Stuart and Dr. Ieselen. Dr. Rall has read this letter and has verified the statements made therein.

The best evidence I can produce in support of the above documents is that ever since 1914 the Swift Fellowship has been awarded in accordance with the declarations made therein by the faculties of Garrett Biblical Institute and of the American University. They have accepted the plan and have made awards accordingly. There have been disagreements at times as to the methods of making nominations and awards. Never but once in all the twenty-eight years has any one suggested a diversion of the fund to any other purpose. Admittedly, Dr. Gray made his inquiry in the hope of helping some student in his institution, but he did so without documentary evidence to support his suggestion, and after a brief reply from this office he dropped the matter. It would seem that the long continued practice, established by those in authority at both institutions who knew all the facts, ought to be sufficient safeguard against revolutionary proposals at this late date. This is particularly true in the light of the comprehensive announcements made by the American University as to its policy concerning fellowships in general, and the Swift Fellowship in particular, at the time this gift was secured.

I am sorry that in our first correspondence I am compelled to write as above, but I am sure you would never have made the proposal had you known the facts, as available at this end of the line. It seems to me that a great issue is at stake, affecting not only our two institutions but the whole matter of trust gifts. If the purpose for which such gifts are made can thus easily and early be entirely changed, then donors will soon lose confidence in our institutions. You asked me to cooperate "in view of the present world confusion." To do so would, in my judgment, greatly add to the confusion, for it would nullify agreements which seem to me to be permanently binding.

Having said all this, let me add that I appreciate the situation in which your institution finds itself. Evidently the plans which the American University once had for a comprehensive system of fellowships has been greatly changed since Mrs. Swift was induced to make her gift on

the basis noted above. The University now finds itself a trustee of a gift which does not directly inure to the benefit of the institution or its students. Many institutions find themselves so situated, because of gifts accepted in an earlier day. While I think you are entitled to some relief, the way proposed does not seem to be the proper solution, and we cannot therefore cooperate as requested.

Assuring you of our appreciation of the service rendered by the American University to a long line of Garrett graduates who have held the Swift Fellowship, I am

Sincerely yours,

President.

HGS:M

Encls.

EXHIBIT B: From the American University Courier, Volume 21, Number 3, Page 16, December 1914.

FELLOWSHIPS

The policy of distributed efficiency is one of the vital elements of the University. This policy is put into operation through the medium of university fellowships. This plan of fellowships will afford opportunities for covering the whole field of knowledge, *and thus will complete the scheme of university study beyond what is afforded at Washington.*

So far as practicable such fellowships will be established and supported from the university funds. To students who thus are granted fellowships there will be opened at once the highest academic opportunities; *for a fellowship will enable a student to pursue work at the institution and in the environment which for his purpose shall offer the largest possible advantages.*

FELLOWSHIP OF TWO CLASSES

(A) Fellows who pursue their studies at seats of learning or at places of study and investigation *within the United States.* A fellow of Class A shall receive a stipend of \$600 per annum.

(B) Fellows who pursue studies *at foreign seats of learning or at places of study and investigation abroad*. A fellow of Class B shall receive a stipend of \$800 per annum.

ADMISSION TO FELLOWSHIPS

Students shall be admitted to fellowships upon the nomination of the school, college or university from which the candidate holds a baccalaureate or higher university degree. The nomination, however, is subject to confirmation by the officers of the American University and by the Board of Award.

TENURE OF FELLOWSHIPS

Appointment to a fellowship shall be for one year, subject to renewal for a second year. In special cases a fellowship may be held for a third year, but no longer. The officers of the American University shall decide upon the length of the term of each fellow.

THE WORK OF A FELLOW

A fellow shall pursue study in such subject or subjects and at such seats of learning or at such places as shall be recommended by his nominating school, college, or university, subject to the approval of the officers of the American University. During the pursuit of such study the student shall be classified as a fellow of the American University, and he must make a semi-annual report to the authorities of the American University concerning his work. Where the study is made under the auspices of some other academic institution each report from the fellow shall be accompanied by an official statement from that institution. The second semi-annual report must be in the hands of the officers of the American University thirty days before the date of the University Convocation.

APPLICATIONS FOR FELLOWSHIPS

Candidates for fellowships in the university will apply to the registrar, Mr. Osborn, for application blanks. These blanks when made out must receive the endorsement of the

institution which granted the candidate his or her baccalaureate or other subsequent degree. The fact that the same institution thus may be called upon to endorse the application of several of its alumni in no case will militate against any applicant, since the final choice of the fellow is made by the Board of Award of the American University.

It is also to be borne in mind that, since actual rank in the classes of the institution which recommends the candidate will not decide the final selection of a fellow, any additional fact or information concerning the candidate that bears on such selection is desired by the Board of Award. Such information might be classes under the following heads: health, life-plan, character, qualities for leadership, personal initiative, etc. Such information may be furnished by reputable persons best acquainted with the candidate.

After the blanks have been filled out in accordance with the printed directions they are to be forwarded to the registrar of the American University. They then will be transmitted to the Board of Award, who will take final action upon them. If desired by the Board of Award the candidate must be prepared to appear before the Board to answer any inquiries or to meet such tests as the Board may order.

GUSTAVUS F. SWIFT FELLOWSHIP

Through the generous gift of Mrs. Gustavus F. Swift there has been endowed a fellowship in memory of her husband, the late Mr. Gustavus F. Swift, of Chicago, Illinois. This fellowship will afford an estimated income of about seven hundred and fifty dollars each year. The incumbent of the fellowship is to be *a graduate of Garrett Biblical Institute*.

***Have underlined certain portions of above statement so as to call attention to the most relevant passages which bear directly upon the Swift fellowship.

EXHIBIT A.

(Excerpt from minutes of meeting of Board of Trustees of Garrett Biblical Institute held at Chicago, Illinois, October 11, 1913.)

"President C. M. Stuart reported that Dr. F. T. Stone, Secretary of the American University at Washington, has informed him that it is the intention of said University to award to Garret Biblical Institute a traveling scholarship yielding \$800.00 per annum, which is to be supported by a fund of \$16,000.00, contributed by Mrs. G. F. Swift of Chicago."

* * * * *

BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA *United States Court of Appeals*
Circuit For the
District of Columbia Circuit

No. 10,449

FILED JAN 26 1950

Joseph W. Stewart

CLERK

GARRETT BIBLICAL INSTITUTE, *Appellant*,

v.

AMERICAN UNIVERSITY, *Appellee*.

Appeal from the United States District Court for the
District of Columbia.

E. F. COLLADAY,
D. C. COLLADAY,
1331 G Street, N. W.,
Washington, D. C.,
Attorneys for Appellee.

COLLADAY, COLLADAY & WALLACE,
Of Counsel.

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,449.

GARRETT BIBLICAL INSTITUTE, *Appellant*,

v.

AMERICAN UNIVERSITY, *Appellee*.

Appeal from the United States District Court for the
District of Columbia.

BRIEF FOR APPELLEE.

COUNTER-STATEMENT OF THE CASE.

This case has resolved itself to this point:

The Appellant contends that the approximately \$16,000 fund used to support the Swift Fellowship was given to the Appellee University by Mrs. Swift under certain unchangeable terms and conditions as to its management and application rendering it a trust fund and that these terms

and conditions are evidenced by circumstances surrounding the making of the gifts and by an allegedly unvaried course of conduct pursued by the University with respect to the Fellowship from its establishment in 1914 through 1941. The Appellant contends that none but its graduates may be awarded the Fellowship; that it has irrevocable authority to select candidates for the Fellowship; that it and the candidates have exclusive authority to designate the type, location, and place of graduate study to be pursued by successful candidates; and that the Appellee University has only authority to select a candidate each year from among those proposed by the Appellant. Appellee contends that the gifts used to support the Swift Fellowship were made to it by Mrs. Swift without restriction except that the Appellee University would establish a Fellowship which, when set up, would be named in honor of her deceased husband and the recipients of the Fellowship were to be graduates of the Appellant institution; that these gifts are part of Appellee's general invested capital endowment funds; that it has done nothing to negative its inherent authority to administer these gifts as it sees fit; that no rights with respect thereto have vested in others; and that the action of its Board of Trustees on April 9, 1942, (App. 11) changing the terms and conditions of award was and is valid.

In short, (1) The University acknowledges that the recipient of the Fellowship is to be a graduate of Garrett Biblical Institute (at least so long as Garrett shall be able to supply suitable nominees); (2) Garrett contends he may study where, what, and how he chooses, without control or supervision by The American University; (3) The American University contends that it controls the selection of the fellow, the place, nature, manner, etc., of his studies, and the administration, etc., of the funds supporting the Fellowship, the same as any other of its invested capital endowment funds.

STATUTES AND RULES INVOLVED.

Besides the statute cited by Appellant (Appellant's Brief 6), there is also involved the Act of Congress approved February 24, 1893, designated as an Act to incorporate The American University, 27 Stat. 476, the relevant portion of which, after naming certain persons, provides that those persons

“and their associates and successors, * * * are hereby constituted a body politic and corporate by the name of THE AMERICAN UNIVERSITY, with power to sue * * *; to * * * take by devise, bequest, or otherwise * * * such real or personal estate as shall be required for the purpose of its incorporation; * * * to choose a Board of Trustees * * * which board shall be authorized to appoint such officers and agents as the business of the corporation shall require and to make by-laws for the accomplishment of its purposes, for the management of its property and for the regulation of its affairs. Said corporation is hereby empowered to establish and maintain within the District of Columbia, a university for the promotion of education. The said corporation shall have power to grant and confer diplomas and the usual college and university degrees, and honorary degrees, and also such other powers as may be necessary fully to carry out and execute the general purpose of the said corporation as herein appearing.”

It is noted that the section of the District of Columbia Code cited by Appellant was, apparently through inadvertence, stated on page 6 of its brief to be Title 27, Section 101; it should be Section 101 of Title 17.

SUMMARY OF ARGUMENT.

The Appellee University at all times has been and is fully empowered to establish and maintain a University for the promotion of education, with power to receive real or personal property for this purpose and with such other powers as necessary to carry out this general purpose.

Inherent in the foregoing was and is the power to administer its affairs and its property as it sees fit. The funds used to finance the Swift Fellowship were given to the University without any restriction whatsoever upon them and have never in anywise been restricted, except that at the time Mrs. Swift promised the last of the three sums which totaled \$16,000 there was understanding on her part with the University solicitor that the University would establish a fellowship which was to bear the name of her deceased husband and that the recipient of its benefits should be a graduate of Garrett Biblical Institute. Those funds are, and always have been, a part of the University's general invested capital funds. The University has and always has had as broad scope of authority over them as over any other part of its funds. Inherent in its authority over the funds used by it to finance the Swift Fellowship has always been and still is the authority to change the terms of award of the fellowship. No right or interest with respect to this fellowship has vested in anyone other than the Appellee University. The action of Appellee's Board of Trustees in 1942 changing the terms of award, but continuing the provision that the beneficiary should be a student nominated by the Garrett Biblical Institute, was fully authorized and was proper.

Appellee has fully presented by its verified Complaint and by the testimony and exhibits introduced at the trial the complete facts in support of the foregoing. Appellant has presented not so much as a single fact negating any of the foregoing. Appellant, instead, has indulged in argumentative inference and unsupported assertion of conclusions.

The action of the trial court was correct and proper, and its judgment in favor of Appellee should be affirmed.

ARGUMENT.

I.

Appellee has, within the limits of its corporate purposes, full right, power, and authority, over its funds, including that portion here immediately involved. Its growth and development show the logic and propriety of the change made in the terms of award of the Swift Fellowship.

By the Act of Congress approved February 24, 1893, designated as an Act to Incorporate The American University, hereinbefore cited and quoted in part, the University was granted the power to take by devise, bequest, or otherwise such real or personal estate as might be required for the purpose of its incorporation; its Board of Trustees was authorized to carry on the business of the corporation and to manage its property and to regulate its affairs; the corporation was empowered to establish and maintain a University for the promotion of education, with power to grant and confer diplomas and the usual college and university degrees, and honorary degrees, and also *such other powers as may be necessary fully to carry out and execute the general purpose of the said corporation.*

There appears to be little, if any, dispute between the parties as to the background facts concerning the early years of the University, its growth and development, and its condition and capabilities in recent years. From the time of its incorporation in 1893 and 1895, The American University entered upon a program looking to the physical and scholastic establishment of the University as a functioning educational institution. This program continued through the years up to the University's official opening on May 27, 1914. During this period the University officials were concerned greatly with the matter of assembling financial strength, acquiring physical properties, and formulating the educational structure of the institution. Many gifts of funds and property were obtained; a campus at Massachusetts and Nebraska Avenue, N. W., Washington,

D. C., was acquired and the original two buildings of the University erected thereon; and various features of the University's scholastic program were formulated and published.

As testified by Dr. Douglass (App. 65ff) the officials of the University came to the conclusion that they must get the institution into operation on some productive basis, and the Board of Trustees on June 6, 1912, authorized appointment of a committee of five to consider and report at the next meeting of the Board a tentative plan for opening the University and the inauguration of academic work. Thereafter, as testified by Dr. Douglass (App. 64), that committee reported the tentative plan to the Board of Trustees on December 11, 1912, and the Board that day adopted and approved it in substance. That plan included establishment of the Board of Award and set forth the general plan for fellowships. The plan for fellowships is quoted (App. 65ff) as well as in the Complaint herein (App. 5ff). The minutes of the Board of Trustees of May 14, 1913, show the plan to have been read and adopted item by item and then as a whole at that meeting. The aforementioned plan for fellowships was first published in Volume XXI, No. 3 of The American University Courier dated December, 1914, being the Catalogue Number for the period 1914-1916. The need for such a plan and the early application of it were outlined by Dr. Douglass (App. 67ff), with various examples of the awarding of numerous fellowships, including the Swift Fellowship. At that stage the University had some funds, some land, and two buildings, but no faculty; and so the fellowship plan was adopted as a means of inaugurating educational operations. In 1919, as testified by Dr. Douglass (App. 68) the University turned to having the Board of Trustees annually adopt a definite program for the educational work for the University for the ensuing year and a budget for the expenses involved in carrying out this plan. In 1923 (App. 69) the Board of Award was changed into an Academic Council because the University

had engaged full-time Deans, and the fellowship program was substantially discontinued. The Academic Council continued in operation until 1929 when the Graduate Council was established, and the latter continues at the present time. In 1941 the University was thoroughly reorganized and at present is composed of a College of Arts and Sciences adequately housed on a campus at Massachusetts and Nebraska Avenues and on properties on F Street between 19th and 20th Streets, N. W., with both a graduate and undergraduate programs; a School of Law; and a division of professional institutes serving approximately 4,500 students a year, day and evening.

Appellee University is not subject to any general limitation negating its asserted position. As was said by this Court in *Colbert v. Speer*, 24 App. D. C., 187, 201:

“For the limitations of the powers and objects of the college, we must look to the charter granted by Congress and not elsewhere.”

And in the case of this University, the special Acts of Congress incorporating it provide that it is

“empowered to establish and maintain within the District of Columbia a university for the promotion of education,” “with power * * * to * * * take by devise, bequest, or otherwise * * * such real or personal estate as shall be required for the purpose of its incorporation;” and “shall have * * * such other powers as may be necessary fully to carry out and execute the general purpose of the said corporation as herein appearing.” 27 Stat. 476.

Moreover, it is well settled that, within the limitations of its charter, a university has power to administer its endowment and award scholarships and fellowships in accordance with such conditions as in its discretion best accomplish its objects.

“Generally speaking college or university funds may be used for any legitimate purpose of the institution * * *.” 14 C.J.S. 1346, 1351.

“From very early times the founding of scholarships in universities has been favored by the law, and such scholarships are nonetheless public charities that they are open to the rich as well as the poor.” *Dexter v. Harvard College*, 176 Mass. 192, 57 N. E. 371.

When the funds here immediately involved were donated to the University and no condition or restriction was attached thereto by the donor, the funds became the absolute property of the University, a part of its capital funds, and complete power of administration thereof lay in the University's Board of Trustees, so long as the University should continue to maintain, as it has done and continues to do, a Swift Fellowship available to graduates of Garrett.

“As between the parties to the transaction, a gift when completely executed, unless obtained by fraud or undue influence or made by a donor under a legal incapacity, operates as a full and complete transfer of the title to the property from the donor to the donee.” 38 C. J. S. 818.

“The endowment of a college is commonly understood as including all property, real or personal, given to it for its permanent support.” *Millsaps College v. City of Jackson*, 48 S. Ct. 94, 95, 275 U. S. 129, 131; see also *Appeal of Wagner Free Institute of Science*, 116 Pa. St. 555, 11 A. 402, 405.

“A ‘College Estate’ comprises not only the college buildings and grounds but also the property held by the college by way of endowment.” 14 C.J.S. 1340.

“The control and disposition of the college or university funds is ordinarily confided to a board of trustees * * * whose discretion in the expenditure of funds or the use of university property will not meet court interference in the absence of abuse, although unless otherwise provided by the constitution, college trustees, regents, and the like are subject to restrictions imposed by the terms of grants or statutes. * * *” 14 C. J. S. 1344, 1345.

II.

The funds in question have never been restricted except that the University was to establish a memorial fellowship in the name of **Gustavus F. Swift** for the benefit of graduates of **Garrett Biblical Institute**.

Against the background of the University's origin and development, as clearly appears from the pleadings, exhibits, and testimony, are the pattern of the benefactions of Mrs. Swift to the University, the genesis of the Swift Fellowship, and the course of administration of its offering and award by the American University.

Prior to 1913 during the time when the University existed as a corporate entity but not as an active educational institution and was engaged in gathering resources, Mrs. Swift gave the University \$27,000 which went into the general fund (P. Ex. 1). September 30, 1913, Mrs. Swift paid over to the University \$5,000; January 17, 1914, she paid over \$6,000; and July 6, 1914, she paid over to the University \$5,000 in the form of first mortgage bonds (P. Ex. 2). By letter of October 7, 1913, (P. Ex. 6) Dr. Stone, Endowment Secretary for the University, reported to the Reverend Franklin Hamilton, then Chancellor of the University, that he had secured from Mrs. Swift an additional pledge of \$6,000 "to be added to the \$10,000 already given" to "increase her subscription to a total of \$16,000". The additional \$6,000 pledge was payable on or before January 15, 1914. It is apparent, therefore, that the payment of \$5,000 made September 30, 1913, was the first half of a single pledge of \$10,000, that half having already been paid at the time the additional \$6,000 pledge was obtained, and the second half of the \$10,000 pledge being due on or before October 1st, 1914 (P. Ex. 9). Under date of May 12th, 1914, Mrs. Swift wrote the University (P. Ex. 3 & 4) with reference to the second installment of the \$10,000 subscription saying that according to her records she had agreed, on October 1st, 1914, to give to the University "to be used as endowment" the sum of \$5,000 and, further, that it occurred

to her that "inasmuch as my contribution is to be used for endowment purposes" the University might prefer to receive that payment in bonds. Thus she, herself, attached to the \$10,000 gift (paid \$5,000 in September of 1913 and \$5,000 later in 1914) the label "to be used as endowment" and "to be used for endowment purposes". Apparently the University agreed to her suggestion of receiving the final payment in bonds in July of 1914 instead of otherwise in October of 1914; for under date of July 3, 1914, Mrs. Swift wrote the University (P. Ex. 5) transmitting the \$5,000 of bonds. In that letter, significantly, she says, "referring to my total pledge to The American University of \$16,000 of which I paid \$5,000 in October, 1913, and \$6,000 in January, 1914, leaving a remainder of \$5,000 concerning which I wrote you in May this year, * * *". Thus she, herself, lumped in the \$6,000 additional pledge which she paid in January of 1914 along with the \$10,000 which she had previously described simply as "to be used as endowment" and "to be used for endowment purposes". The foregoing is the only direct evidence in this case as to what Mrs. Swift, herself, considered to be the terms and purpose of her gifts to the University which were used by it to support the Swift Fellowship. She had given her \$10,000 subscription before being approached on the subject of a fellowship and she characterized that subscription merely as for endowment purposes, and this in the light of having given already \$27,000 in four items all of which went into the University's general fund (P. Ex. 1). It is apparent, therefore, that Mrs. Swift was approached with the suggestion of making the additional \$6,000 gift in order that the University might actually have at the time of its opening in May of 1914 the means to support and to announce its first fellowship. The letters written by Dr. Stone to Dr. Franklin Hamilton (P. Ex. 6 & 7) and to Dr. Osborn (P. Ex. 8) and Dr. Stone's report to the Board of Trustees of the University (P. Ex. 9), when taken together, show that he approached Mrs. Swift with a proposal that she give the additional \$6,000 in order that a fellowship might be established and that he

used as persuasion the suggestion that the fellowship be named for her deceased husband. It is also apparent from these documents that he discussed with her the idea of a "Foreign Fellowship" having in mind the statement as to such a class of fellowships in the plan for fellowships previously referred to herein. But it is obvious that this proposal was not definite. At one time he referred to the establishment of "a perpetual Foreign Fellowship for Garrett Biblical Institute at Evanston" (P. Ex. 6), but in no other instance did he so refer to it. On the contrary, he referred in another letter (P. Ex. 7) to the "plan of opening and course of procedure" and "the proper solution to the opening and initial development of the University". Moreover, in Plaintiff's Exhibit 6 he said, "I told her you certainly would agree to this proposition" and in Plaintiff's Exhibit 7 he suggested that Dr. Hamilton "write Mrs. Swift a letter of appreciation". Then he went on to suggest reservation to The American University of the right to use the income for other students than those of Garrett if Garrett at any time should have no nominations to make and also reservation of the right not to accept a nominated student if unsatisfactory to the Board of Award. In Plaintiff's Exhibit 8 with which he transmitted the additional subscription to Dr. Osborn, he makes the simple statement, "it is given on condition that the total sixteen thousand (\$16,000) shall become a fellowship 'in perpetuity' for Garrett Biblical Institute at Evanston, Illinois". In plaintiff's Exhibit 9, Dr. Stone's report to the Board of Trustees, he reports that he has secured the funds for "the first fellowship as outlined by your action last May". He goes on to say that this was given by Mrs. Swift in the name of her deceased husband, states when the amounts are to be paid or have been paid, and says, "the fellowship is assigned to Garrett Biblical Institute in perpetuity". And in the publication announcement of the fellowship by the University, along with publication of its general plan for fellowships in connection with the opening of the University,

in The American University Courier for December, 1914, being the Catalogue Number for 1914-1916, (P. Ex. 10), the simple statement is that through the gift of Mrs. Swift there has been endowed a fellowship in the name of her deceased husband which will afford an estimated income of about \$750 per year and that "the incumbent of the fellowship is to be a graduate of Garrett Biblical Institute".

It is transparently obvious that the only things defined about the fellowship as between Mrs. Swift and the University were that it was to bear her deceased husband's name and that the recipient of its benefits should be a graduate of Garrett Biblical Institute. The reference by Dr. Stone to a "Foreign Fellowship" and the fact that the capital fund was established at \$16,000 (the amount estimated to be required for a foreign fellowship as outlined in the plan) lose their persuasiveness when it is realized that Mrs. Swift did not die until May 19, 1922, and the fellowship was awarded each year beginning with 1915 and the evidence is that it was awarded for study within the United States. The first award was for study at Harvard University (D. Ex. 4). There is evidence of award for study abroad only in two instances (P. Ex. 15 & 16), one in 1922 and the second in 1929.

Moreover, the evidence is that the administration of the fellowship was not uniform. There is evidence tending to show that it was awarded once without a nomination from Garrett (P. Ex. 14) and that in at least one instance it was divided between two students (P. Ex. 17).

In addition there was dispute at one time as to whether the enjoyment of the fellowship might be postponed for a year from the time of award (P. Ex. 18), and it is apparent that the University exerted its authority by denying that privilege in the face of strong protest from Garrett. The strongest evidence of all as to the authority of the University, however, is contained in the letter written by President Stuart of Garrett to Chancellor Hamilton of the University on February 17, 1915, just two or three months before the

first award was made (P. Ex. 11). In that letter Dr. Stuart wrote, "as I understood it, we were to nominate, you were to confirm and to direct the subsequent work of the men selected". Moreover, let it not be forgotten that Dr. Horace G. Smith, President of Garrett Biblical Institute and the only witness called by the defendant at the trial testified unequivocally (App. 74) that The American University made the selections of the persons awarded the fellowship and (App. 75) that "*Garrett does not designate where these men are to go*".

It is clear, therefore, that Mrs. Swift was not concerned with any details about this fellowship except that it should be named for her husband and that the recipient should be a graduate of Garrett Biblical Institute.

In this connection it is of particular interest to note the further treatment of Mrs. Swift's three gifts here involved as they were handled in other records of the University. The minutes of the meeting of the Board of Trustees to which Dr. Stone's report (P. Ex. 9) was addressed shows the following simple entry (App. 50):

"In the concrete increase of our resources there has been added a new fellowship of \$16,000; the gift of Mrs. G. F. Swift of Chicago. \$5,000 of this has been paid. In January \$6,000 more will be paid. The following \$5,000 will be paid within the year sometime."

Not to be overlooked, too, are the original entries of receipt of the three gifts. The first \$5,000 was entered in the University journal under date of September 30, 1913, as general endowment fund; that at some later date was stricken out and above it was written "The Gustavus F. Swift Fellowship, Mrs. Annie M. Swift, Chicago, Illinois". The remaining two gifts were entered in the journal as "Gustavus F. Swift Fellowship Fund. Mrs. Annie M. Swift, Chicago, Illinois" (App. 47-48). This further confirms that Mrs. Swift subscribed \$10,000 for general purposes of endowment and that, after she had paid one-half of it she was approached to subscribe \$6,000 in addition so as to

make available a \$16,000 basis for the granting of a fellowship. The three items are seen to have been brought together in the University journal under date of May 1, 1920; it was captioned "Gustavus Swift Fellowship Fund" and showed an amount of \$16,431.25 (App. 50) and in the same journal there was found an entry of the assets of the fund; it was captioned: "Gustavus Swift Fellowship Fund. This fund is a gift from Mrs. Annie M. Swift of Chicago, Illinois, as a memorial of her husband, the income of which goes for annual fellowships for an alumnus of the Garrett Biblical Institute" (App. 51).

It will be noted that at no place in the records of the University concerning this fellowship was any indication of restriction upon its administration except that the principal was to be protected and the income used to provide a fellowship for a graduate of Garrett Biblical Institute in the name of Mrs. Swift's husband; and even this goes beyond anything stated by Mrs. Swift in connection with making the gifts, for she only referred to them as "for endowment".

III.

Appellee has and always has had as broad authority over this part of its funds as over any other part thereof.

As has been demonstrated hereinbefore, the funds here involved were given to the University by Mrs. Swift "for endowment", she understanding that the University would establish a memorial fellowship in the name of her deceased husband to be made available to graduates of the Appellant Institute. The instant funds thereby became a part of the University's endowment, and it became entitled to administer the instant funds in the same manner as any other part of its endowment, subject only to its obligation to establish and maintain the fellowship as above-stated.

IV.

No right or interest with respect to this fellowship has vested in anyone other than the Appellee, and the Appellee has always had and still has the authority to change the terms of award.

There is no evidence before the Court of any action by the University which might be construed as binding it to maintain in perpetuity any particular method of administration and offering and award of the Swift Fellowship, nor is there anything to show that any rights in or to the fellowship vested in others. We have already seen that there were changes and variations from time to time in the offering and award. For instance, the two occasions when the proceeds were divided between the two students, the instance where the award is said to have been made without a nomination from Garrett, and the cases of awards for study within the United States and for study in foreign countries. We have already seen, too, that from time to time there was difference of opinion between the two institutions as to the manner in which the fellowship should be handled but that consistently the University maintained that the authority of Garrett was limited to nominating candidates. Furthermore, although Dr. Stuart reported to his Board of Trustees in October of 1913 that the annual payment to the successful applicant would be \$800, the amount actually payable from year to year varied widely. The copy of letter of February 26, 1915, to President Stuart responding to the latter's letter to Chancellor Hamilton of February 17, 1915, (P. Ex. 11) shows the estimated income at that time was \$725. John W. Hamilton's letter to Dr. Stuart concerning the manner of handling the fellowship and, apparently replying to a protest as to the amount to be paid to the student (P. Ex. 13), shows the amount available at that time was only \$480 and goes on to say, "You must see we cannot award more money than we have". Rather than showing that the Uni-

versity either relinquished or never had control over this fellowship, the record is directly to the contrary, beginning with the original general plan for fellowships and continuing throughout the administration of the fund. The original plan (P. Ex. 10) shows a strict reservation of rights in the University. In the second paragraph it states that a fellowship will enable a student to pursue work at the institution and in the environment which for his purpose shall offer the largest possible advantages. It does not say, however, that he or any one other than the University is to make the decision as to what institution or environment will meet this test. In the fifth paragraph of the plan it is provided that students may be nominated but that the nomination is *subject to confirmation by the officials of The American University and by the Board of Award*. In the seventh paragraph of the plan it provides that the approval of the officials of the University is required as to the subject to be studied and place of study. In the 9th paragraph of the plan is a request for the fullest of information concerning candidates, to aid the Board of Award. The next paragraph of the plan provides for the filing of applications with the University and states that they will be transmitted to the Board of Award and that the Board of Award will take final action upon them and that, if desired by the Board, the candidate must appear before the Board to answer any inquiries or to meet such tests as the Board may order. It is difficult to imagine a more complete reservation of authority in the University, and there has been no material deviation from the essentials of that plan.

V.

Appellant has utterly failed to produce a single fact negating Appellee's contentions.

Nothing has been produced by the defendant to indicate that these gifts in question were in anywise restricted by Mrs. Swift except to designate them for endowment pur-

poses, which would mean simply that the principal should be held intact and only the income used, a course which the University has followed consistently with respect to them. President Smith, of Garrett Institute, in his lengthy letter of protest of December 16, 1941 (D. Ex. 6), after referring to an announcement of the fellowship by President Stuart to his Board of Trustees, October 11, 1913, and to certain of the material published in *The American University Courier*, stated that these "are supported by letters from F. M. Stone who secured the gift, from Franklin Hamilton and John W. Hamilton, as well as by letters and printed forms by Frank W. Collier who handled all the correspondence for *The American University* for many years." But at the trial the defendant produced nothing of that nature except the printed form of application used for this and other fellowships. That form (D. Ex. 4) shows on its face—and President Smith so testified (App. 80)—that it is in the form of an application to *The American University* for a fellowship, that it contains a statement of the proposed institution or place of study, with various other facts concerning the applicant, and that the endorsement by his college or university is that of a *nominator*. In short, it shows on its face that all that Garrett Biblical Institute could do was to nominate applicants and that *The American University* was to determine how and upon what terms a fellowship should be awarded. The announcement of the fellowship by President Stuart, referred to and attached to President Smith's letter is not persuasive; it is simply a statement that President Stuart reported that Dr. Stone "had informed him that it is the intention of said University to award to Garrett Biblical Institute a travelling scholarship yielding \$800 per annum, which is to be supported by a fund of \$16,000 contributed by Mrs. G. F. Swift of Chicago". That was on October 11, 1913, just 2 or 3 days after Dr. Stone obtained the \$6,000 subscription from Mrs. Swift and at a time when no official action of the University had been taken with regard

thereto. As has been pointed out, Mrs. Swift continued to live for many years during which time the fellowship was awarded, and there is no slightest indication of any protest on her part or any prescription by her as to how the fellowship was to be handled. It was being awarded to a graduate of Garrett Biblical Institute each year and was given the name of her deceased husband, and that apparently was all that she intended or expected.

The foregoing is further borne out by the three letters between the two institutions in June of 1917 and July of 1918 (P. Ex. 12, 13 & 14). Exhibit 12 is a strong protest by President Stuart at the division of the fellowship between two students; it will be recalled that a similar treatment was used again in 1937 by the University as shown by plaintiff's exhibit 17. Exhibit 13 is the longhand letter of John W. Hamilton (agreed upon the record to be dated July 6, 1918) (App. 56) in which the then Chancellor Hamilton of the University very definitely stated to Dr. Stuart that the Board of Award would act according to their best judgment in the awarding of fellowships, that foundations and faculties might nominate applicants, and that the Swift endowment was for fellowships for graduates of Garrett Biblical Institute, which was authorized to nominate the applicants. Exhibit 14 is Dr. Stuart's reply to Exhibit 13; and in it he took a very conciliatory attitude and said that he "would like to reserve comment for the present".

President Smith in his letter (D. Ex. 6) in the sixth paragraph thereof contends that Mrs. Swift gave the University these funds on the basis of the University's publication of its plan for fellowships. As we have seen, however, that plan was not published until more than a year after her subscriptions for the funds here involved were given and after all of the said funds had been paid by her to the University. It is true that the plan was known to Dr. Stone; in fact it is plain that he went after the additional money needed to support this fellowship having in

view the fellowship plan which had been finally adopted in May of 1913. His report to the Board of Trustees of the University in December of 1913 (P. Ex. 9) specifically says "it has been my privilege to secure the funds for the first fellowship as outlined by your action last May". But we cannot speculate as to what conversations he had with Mrs. Swift; we can only look at the University's records and at such records as we have before us.

Dr. Smith in his same letter further implies that Mrs. Swift was influenced by the fact that Dr. Stone was a Garrett Alumnus; he says "doubtless it was on the basis of this official statement that an alumnus of Garrett Biblical Institute, then acting for The American University, persuaded Mrs. Swift to invest her funds in an institution so far away from home to help an institution so near to home". The implication is not borne out by the facts; Mrs. Swift's deep interest in The American University is abundantly apparent from the evidence before the Court.

The evidence before the Court shows Mrs. Swift's interest in The American University to have been deep and lasting and to have been evidenced repeatedly, not only by statements of hers, but also by her gifts. The list of gifts introduced in evidence (P. Ex. 1) shows a total of \$81,500 donated by her to the University, largely without restriction, extending from May 10, 1905, through April 4, 1921, and culminating in a cash bequest of \$25,000 in her will. Dr. Stone's letter of October 8, 1913, (P. Ex. 7) discloses that "Mrs. Swift has promised to endeavor to open the way for me to see her sons"; in other words, she was not only willing to make large gifts to the University herself but was willing to use her good offices in an effort to enlist the interest of other members of her family on behalf of the University. Mrs. Swift's own letter of November 5, 1907, (P. Ex. 19) discloses her pronounced cordiality toward the University and Dr. Hamilton, then Chancellor, in discussing the possibility of her endowing a chair. In her letter of November 16, 1907, (P. Ex. 20)

Mrs. Swift's close feeling toward the University is shown in her statement: "There is another thing I could hardly think of doing which would be to endow a chair for Mr. Swift before one should be endowed for each of *our deceased Presidents* Hurst & McCabe" (emphasis supplied). Dr. Hurst was the first Chancellor of The American University and Dr. McCabe was the second (App. 70).

By contrast with the foregoing, the lack of any evidence on behalf of the defendant as to any special interest of Mrs. Swift in the Garrett Institute is highly significant.

VI.

The action of Appellee's Board of Trustees in 1942, changing the terms of award, was fully authorized and was proper.

The facilities for graduate study offered by the University in recent years and the excellent quality of its graduate school stand unquestioned (App. 70-71). Nor is any doubt left as to the availability in the University's graduate school of courses and degrees appropriate to further study by graduate students holding theological degrees (App. 69-71). The defendant makes the point that the University has no school of theology. However, the evidence is that there have been and are such students in the University's graduate school and that they have been awarded graduate degrees.

The simple fact of the matter is that over the years the officials of Garrett Institute came more and more to regard the Swift Fellowship as something belonging to Garrett Biblical Institute of which The American University was and must always continue a mere ministerial custodian. This is evidenced in correspondence and in testimony by expressions, such as that Garrett "granted" the fellowship, that Garrett nominations should be final except for a choice among candidates, and the like. As a result, when the University in 1942 changed the terms of award to re-

quire the successful candidate to study in The American University, Garrett took the position that they could not nominate any one because it was their view that the University did not offer suitable studies. In other words, Garrett wished to insist upon nominating one or more of its students who were the topmost men in the graduating class and then have the fellowship fitted to their desires as to study. There is no evidence whatsoever that Garrett made any attempt to find students in its graduating classes who would benefit and would care to have the types of study and instruction offered by the University's graduate school, and the implication from the over-all picture is inescapable that they did not make any such attempt. Instead, they have adopted the position that, because the University for a number of years chose to permit a large degree of autonomy to candidates in the selection of studies and places of study, The American University cannot now exert the authority which it clearly has had from the beginning to control the administration and offering and award of this fellowship. It is respectfully submitted that such a proposition is unsupported by legal authority.

CONCLUSION.

At the risk of understatement, it may now fairly be said that this controversy has been fully explored. The case was heard first in the District Court upon motions for summary judgment founded on the fullest of pleadings and thorough argument of counsel for both parties. That hearing resulted in judgment for the Appellee, plaintiff below. Appellant brought its appeal from that judgment to this Court where, after presentation of carefully prepared briefs and full argument, this Court determined that there was a possibility of additional facts being disclosed upon trial on the merits and accordingly remanded the case to the District Court for such proceedings. Accordingly, the case was tried upon its merits after access had been afforded the

Appellant to any and all of Appellee's records, files, documents, etc.; voluminous testimony and exhibits were presented by the Appellee, and some testimony and exhibits were presented by the Appellant. The result again was judgment for the Appellee. Appellant again brings this cause here on appeal.

The correctness of the judgment of the learned trial court seems scarcely open to doubt. The exhibits and testimony and pleadings show plainly that the funds in question were given to the Appellee University for endowment and without restriction except the understanding of the donor that the University would establish and maintain a fellowship in the name of her deceased husband to be available to graduates of the Appellant Institute. This has consistently been done. Nothing has appeared from any of the evidence in derogation of the Appellee's right to administer the funds in question as it sees fit and to control the conditions of award of the fellowship.

The judgment of the trial court unquestionably should be affirmed.

Respectfully submitted,

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REPLY BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT *United States Court of Appeals*
For the
District of Columbia Circuit

No. 10,449

FILED MAR 14 1966

Joseph W. Stewart

CLERK

GARRETT BIBLICAL INSTITUTE, *Appellant*,

v.

AMERICAN UNIVERSITY, *Appellee*

Appeal from the United States District Court for the
District of Columbia

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AMERICAN UNIVERSITY, *Appellee*

Appeal from the United States District Court for the
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REPLY BRIEF FOR APPELLANT

The appellant, in its original brief, set forth the facts relating to the establishment of the "Gustavus F. Swift Fellowship", including the circumstances and conditions under which the American University solicited from Mrs. Gustavus F. Swift the funds with which to establish the fellowship, the actions of the American University in working out a plan of opening the university in 1912 and 1913, and the conditions under which the Swift Fellowship was estab-

lished. These facts and circumstances are conclusive of the proposition that the \$16,000 was donated by Mrs. Swift to the American University as a fund with which to establish a fellowship the income of which was to be used for the further education of a graduate of Garrett Biblical Institute who would be privileged to pursue studies at seats of learning, or at places of study and investigation, either within the United States or abroad. Thus, the fund donated by Mrs. Swift created a trust for educational purposes. This was so recognized and so treated by the American University from 1915, the year the first fellowship was granted, to and including the year 1941.

In 1942 the American University sought to change the terms, conditions and restrictions of the trust by adopting a resolution directing that, in the future, the recipient of the Swift Fellowship would be compelled to attend the American University. It is this resolution that the appellee says is a breach of the trust and is an unlawful attempt by American University to change, to its benefit, the terms of the trust, and is in violation of the terms and conditions under which the fellowship was established.

The principal contentions of the American University, as set forth in its brief, are:

1. (a) It controls the selection of the fellow, and the place, nature, manner, etc. of his studies.
- (b) It controls the administration, etc. of the fund supporting the fellowship, the same as any other of its invested capital funds.
- (Appellee's Brief 2)
2. The funds used to finance the Swift Fellowship were given to the university without any restriction whatever and have never, in any wise, been restricted except to the extent that there was an understanding between Mrs. Swift and the solicitor of funds for the university that the fellowship would bear the name of Mrs. Swift's deceased hus-

band and that the recipient should be a graduate of Garrett Biblical Institute.

(Appellee's Brief 4)

3. The funds donated by Mrs. Swift to establish and finance the fellowship are, and always have been, a part of the general invested capital funds of the university and it has the same broad scope of authority over that fund as it has over any other part of its funds, including the authority to change the terms of award of the fellowship.

(Appellee's Brief 4)

Appellee states that its complaint and the testimony and exhibits introduced at the trial constitute complete facts in support of its contention, and that the appellant has presented not so much as a single fact negating any of the foregoing. Parenthetically, all of the exhibits introduced at the trial were produced by appellee upon appellant's motion to inspect all the records of the university pertaining to this subject matter. All of these exhibits were produced by the university pursuant to appellant's motion, inspected by appellant's attorneys, and it was agreed upon between attorneys for the parties that these exhibits would be introduced at the trial. Further, appellant's exhibits 2, 3, 4, 5 and 6 (App. pp. 110-121), as well as the testimony of the witness Dr. Horace G. Smith, President of Garrett Biblical Institute (App. pp. 72-79), were introduced at the trial as additional support for appellant's contentions.

Appellee states, in its brief at page 14:

"It will be noted that at no place in the records of the University concerning this fellowship was any indication of restriction upon its administration except that the principal was to be protected and the income used to provide a fellowship for a graduate of Garrett Biblical Institute in the name of Mrs. Swift's husband * * * ."

Plaintiff's Exhibits 6, 7, 8, 9, 10 and 11 (App. 88-99) and Defendant's Exhibits 2-6 (App. 110-121) not only indicate but show conclusively that the fund in question was donated by Mrs. Swift for the purpose of establishing a fellowship in the name of her husband; that the recipient of the fellowship should be a graduate of Garrett Biblical Institute; that the recipient of the fellowship was privileged to attend a seat of learning either within the United States or abroad; and that these restrictions had been recognized and adopted by the American University in carrying out the terms and conditions of the fellowship for a period of more than twenty-five years.

The appellee, at pages 18 and 19 of its brief, states that the plan for fellowships was not published until more than a year after Mrs. Swift's donation, and thereby attempts to impress upon the Court that Mrs. Swift knew nothing about the plan which had been adopted by the American University in May of 1913. Such a tenuous argument is completely without foundation in fact. The exhibits referred to in the immediately preceding paragraph of this brief disclose that Mrs. Swift was advised of the existence of the plan for fellowships by the solicitor of funds for the American University even prior to October 7, 1913, and that Mrs. Swift donated the funds pursuant to such plan. (Plaintiff's Exhibits 6, 7, 8 and 9, App. 88-94).

Plaintiff's Exhibit 10 (App. 94) dated December 1914, which contains the plan referred to by the appellee, shows on its face that the Swift Fellowship had been financed and established prior to the publication of this exhibit. It states:

"Through the generous gift of Mrs. Gustavus F. Swift there has been endowed a fellowship in memory of her husband, the late Mr. Gustavus F. Swift, of Chicago, Illinois. * * * The incumbent of the fellowship is to be a graduate of Garrett Biblical Institute." (App. 96)

Further, the exhibit states:

"To students who thus are granted fellowships there will be opened at once the highest academic opportunities; for a fellowship will enable a student to pursue work at the institution and in the environment which for his purpose shall offer the largest possible advantages." (App. 94)

Quite to the contrary of what appellee states, we confidently assert that the testimony and the exhibits clearly sustain the position taken by appellant. When the funds with which to establish the fellowship were solicited, the American University was not even a going concern, nor was it in business as an educational institution when the fellowship was established. Dr. Douglass, now President of American University, testified:

"During this period from 1893 until 1914 the university was engaged in promotion, fund-raising, trying to obtain support from the Methodist Church to proceed with its work.

"The funds which were expected to come from the church never came, and the record shows that in 1912 the Board of Trustees decided to proceed to the operation of an academic program. They held 90 acres of land with two buildings, one building completed and one in process of completion, at Massachusetts and Nebraska Avenues, and the records show that the board in deliberation decided to open academic work in terms of this tentative working plan.

* * * * *

"This action, this working plan, was reported to the board—this tentative plan reported to the board—on December 11, 1912, and adopted by the Board of Trustees, and became operative in 1914 with an inauguration address delivered by President Woodrow Wilson of the United States.

"Now, the university had inadequate funds. it had no faculty, it had no organized curricular offerings, and so this provision of fellowships, in this tentative plan, was the way that the university operated from 1914 until 1919, * * *"

(App. 66, 67)

Certainly, in the face of this testimony and the exhibits in the record, it appears unmistakably clear that when the funds were solicited, donated and used for the fellowship the parties intended that the recipient of the fellowship should attend a seat of learning, either within the United States or abroad, and was in no wise limited to attending the American University, which had no funds, no faculty and no curricular offerings. The fact is that American University has never had, and does not now have, a school of theology and, therefore, cannot grant a degree of Bachelor of Divinity (Tr. p. 71). American University has never taught, and does not now teach subjects which meet the needs and requirements of a graduate of Garrett Biblical Institute for further study in the field of theology (Tr. pp. 75-76).

The appellee states, on page 4 of its brief, that the funds establishing the Swift Fellowship are and always have been a part of the University's general invested capital funds, and that the university had the same authority over them as over any other part of its funds. This position is directly contrary to the testimony of its own witness, Don Farquharson, and to the contents of the records that he produced at the trial (App. pp. 46-64). Under cross examination, the following questions and answers appear:

"Q. What I am getting at is if all through these years this fund was kept separate and distinct and the only things charged against it being the university charge for handling and the cost of the fellowships.

"A. I would assume that the fund is a restricted fund. Therefore, the income would need to be held in a restricted manner.

"Q. What do you mean by restricted fund in restricted manner?

"A. The purpose of the gift was restricting it to a fellowship. Then it could not be used for the actual operation of paying salaries, and paying for coal, and improving the university. And, being held in a restricted fund, only those payments could be made against it in which the restriction would apply, and in

these two instances there would be the cost of the fellowship plus the cost of handling the fund.

"Q. And the balance was still retained in this restricted fund?

"A. That is right."

(App. p. 61)

and

"Q. Just one question, Mr. Farquharson: You based your answers to me from your examination of the books of the university, did you not?

"A. I did not understand you.

"Q. What I mean is this: You are the chief financial officer of the university, are you not?

"A. That is right.

"Q. And you are familiar with the books of the association, both since you became treasurer and before?

"A. That is right.

"Q. In other words, to do your duties properly you would have to know what has gone on before or at least what the record shows has gone on before. Is that not correct?

"A. That is right."

(App. p. 63)

Thus, the American University always treated the Swift Fellowship fund, not as a part of its capital fund, to be used as it saw fit, but as a fund limited and restricted to certain use—viz., a trust fund the income of which was to be used yearly by a graduate of Garrett Biblical Institute pursuant to the terms and conditions of establishment of the Swift Fellowship.

We subscribe to the legal principle as set forth at page 8 of appellee's brief. The difficulty with appellee's position is that the facts in this case are entirely different from those set forth in the cases which it cites. Contrary to appellee's statement at page 14 of its brief, there are conditions and restrictions on the donation recognized and car-

ried out for a period of over twenty-five years, and in those cited authorities there were no conditions or restrictions.

"Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence." *Old Colony Trust Co. v. Omaha*, 57 L.Ed. 1411, 1117; 230 U. S. 100, 118.

"Contracts, where their meaning is not clear, are to be construed in the light of the circumstances surrounding the parties when they were made, and the practical interpretation which they, by their conduct, have given to the provisions in controversy." *Harten v. Loffler*, 29 App. D. C. 490, 502, quoting from *Lowber v. Bangs*, 2 Wall. 728, 737, 17 L.Ed. 768, 769.

We submit that if the facts disclosed by this record establish a trust or a gift with legal restrictions upon it which the appellee is bound to carry out, the appellant's position should be sustained. If there is no trust and no gift with such restrictions as herein stated, the position of the appellee should be sustained.

In American Law Institute, Restatement of the Law of Trusts, Sec. 349, the rule is recognized that a charitable trust may be created by "a transfer *inter vivos* by the owner of property to another person to hold it upon a charitable trust." Sec. 370:

"A trust for the advancement of education is charitable." Among these are " * * * to establish scholarships or otherwise to assist students in acquiring education * * * ."

Sec. 379:

"The duties of the trustee of a charitable trust are similar to the duties of the trustee of a private trust."

Sec. 381, under Deviation from Terms of Trust:

"The court will direct or permit the trustee of a charitable trust to deviate from the terms of the trust if it appears to the court that compliance is impossible

or illegal, or that, owing to circumstances not known to the settlor and not anticipated by him, compliance would defeat or substantially impair the accomplishment of the purpose of the trust."

Obviously, compliance with the terms of this trust is not impossible or illegal, and continued compliance with the terms of the trust in the manner in which they have been carried out over a long period of years is the only way by which the purposes of the trust can rightfully be said to have been accomplished.

CONCLUSION

The resolution of the Board of Trustees of American University, dated April 9, 1942, is in violation of the trust. The testimony and exhibits in the record impel the conclusion that the recipient of the Swift Fellowship award:

- (a) shall be a graduate of Garrett Biblical Institute;
- (b) shall not, as a condition thereof, be compelled to attend the American University.

Appellee's brief is utterly devoid of any legal authority in support of its tortured effort, at this late date, to change the terms of the trust which it undertook to administer over thirty-four years ago.

The judgment of the District Court should be reversed and the court below directed to enter judgment that appellee be compelled to administer the trust in accordance with its terms, as contended for by appellant, or should be removed and another trustee substituted.

Respectfully submitted,

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